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ROMAN LAW.

INTRODUCTION
TO
ROMAN LAW

BY

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PREFACE.

THIS book is intended to serve as an introduction to the study of Roman Law, and to give adequate information to those who require a mere elementary knowledge of the subject. On the points of leading importance, a comparison is instituted between the English and Roman Law.

The matter of this book is to a large extent the same as the Institutes of Justinian, but with two exceptions. I have omitted many particulars that were useful to the persons for whom the Institutes were written, but are of little value to a student of modern law. On the other hand—especially in the Law of Property and Contract—the glaring deficiencies of the

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Institutes are largely supplemented. The object that has been kept in view is to put the student in possession of such information and legal principles as will enable him to acquire a more intelligent comprehension of modern law.

The arrangement follows the order of the Roman Institutional writers. They arranged law in three groups—(1) law concerning persons; (2) law concerning things; and (3) law concerning actions. Practically they subdivided 'things' into—(1) property; (2) obligation; (3) inheritance. 'Inheritance' is discussed in the Institutes after 'property,' and before 'obligation'; but it is more convenient to take it after 'obligation.'

As the present work is intended to serve as a companion to the Institutes of Justinian, the arrangement of Justinian has been, with that exception, substantially followed.

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INTRODUCTION
TO
ROMAN LAW.

ROMAN LAW.



CHAPTER I.

HISTORY OF ROMAN LAW.

THE Roman Law presents two aspects, each deserving the attention of the student of Jurisprudence. It furnishes the basis of much of the law of Europe, and has long proved an almost inexhaustible storehouse of legal principles. In the history of legal conceptions, again, it occupies a position of unique value. It forms a connecting link between the institutions of our Aryan forefathers and the complex organisation of modern society. Its ancient records carry us back to the dawn of civil jurisdiction, and as we trace its course for more than a thousand years, there is exhibited a panorama of legal development such as cannot be matched in the history of the laws of any other people.

The Priest
and the
Jurisconsult,

A glance at the earliest authentic legal documents of Rome reveals to us the great advance already made by the Romans as compared with the Hindoos and other ancient peoples. In the laws of Menu or of Moses, law is inextricably mixed up with cosmogony, with religious rites and moral rules. There are not wanting indications of the influence of religious conceptions on Roman Law, but at an early stage the practical Roman mind had drawn a clear line between the office of the priest and of the jurisconsult. The establishment of the Republic emphasized the separation of law from religion. The king was chief pontiff as well as head of the State ; but on the abolition of the monarchy the new magistrates were confined to secular affairs, leaving to the College of Pontiffs the undivided care of spiritual matters. To this circumstance may be ascribed in no slight degree the early and rapid progress of the legal institutions of Rome.

Law of
Nature.

The Roman genius was essentially practical ; to the speculative or theoretical side of Jurisprudence it made no contribution ; indeed, such was its poverty in this respect, that it was constrained to import from Greece elementary notions in respect to the foundations of law. The Stoics said the whole duty of man was summed up in one sentence—to act according to nature. By nature

they meant a somewhat vague notion of the universe as governed by law, on the moral as well as on the physical side. In looking for such a law, men sought what was common or universal, and not what was peculiar to different communities. It happened that in Rome, when the Stoic philosophy was first introduced, the distinction between the law peculiar to Roman citizens (*jus civile*) and the law applicable to other peoples generally (*jus gentium*) was sharply accentuated. The jurists seized the notion of a law of nature, and proceeded to identify it with the *jus gentium*, so that the two phrases became convertible, with but one exception. The Stoic morality affirmed that slavery could not be attributed to Nature, although it was unquestionably a part of the *jus gentium*. In the passage taken from Ulpian that is found in the Institutes of Justinian, the law of nature is confounded with the instinct of animals; but this blunder only serves to show how slight an understanding of the principles of Stoicism was possessed by Ulpian. The law of nature appears in the legal writings of the Romans as a sort of intellectual garnish, that had no real connection with the Roman Law. It is an idea that explains nothing and illuminates nothing.

The oldest fragments of Roman Law that have come down to us are ascribed to the period of the *Leges Regiae*.

Kings. At Rome, a collection of such laws (*leges regiae*), attributed to *Sextus Papirius*, was known under the name of *jus Papirianum*. Fragments of these laws have been collected from various authors by the diligence of modern inquirers, but we may take the XII Tables as the first solid ground in the history of Roman Law. The agencies by which that Law was developed, by which the scanty rules of the early age of the Republic grew into the *Corpus Juris Civilis* as it was left by Justinian, were three in number—Interpretation by the Jurisconsults, Equity by the Praetor, and Legislation. Before considering these agencies in detail, a brief account of the XII Tables may be given.

XII
Tables.

THE LAWS OF THE XII TABLES.—About the year 450 B.C., a commission is said to have been appointed in Rome to visit Greece, and collect the information necessary to draw up a written body of laws. This suggestion of a foreign extraction for the oldest body of Roman Law, although it seemed in no way incredible to the great jurist Pomponius, can hardly be reconciled with the conclusions drawn by modern inquirers from a wider knowledge of the history of ancient law. But although the XII Tables undoubtedly contain law of indigenous growth, yet they do not give us the oldest law of Rome. Three centuries intervene between the reputed founding of the city and

the XII Tables. During this period, perhaps even earlier, the fundamental institutions of Rome were already undergoing a process of decay. The autonomy of the family, and the absolute authority of its head, were, in the middle of the fifth century before Christ, already shaken. The XII Tables contain provisions enabling a wife or a child to escape from that domestic thralldom upon which society in ancient Rome was based.

One of the most striking features of ancient society is the extreme tenacity with which it adheres to its usages. In some cases the immobility of ancient law may be ascribed to the religious sanction with which it was clothed. The laws are attributed to some divine being, from whose statutes and ordinances it were impiety to depart. But even when laws are attributed to a mere human legislator, there is still a profound dread of change. The attitude of primitive man towards the customs he has been taught to observe, is the counterpart of his timidity in the presence of nature. Man is timid where a being of less intelligence would be calm, because he perceives countless possibilities of suffering and calamity from the movement of the forces of nature, while yet his experience is too narrow to enable him to tell where evil will arise, and how it may be prevented. Thus, in a backward state of society, any

Ancient
Conserva-
tism.

- change in the law is both feared and disliked. But in a progressive community, an expansion and growth of law is essential. How that is to be accomplished is the problem of vital interest. In the three agencies that have been enumerated, there may be remarked a progressive openness in effecting changes in the law. Thus, ostensibly, the
- Interpre-
tation.** jurisconsults do not 'make,' they only 'interpret' law ; and yet in numerous cases, by their process of interpretation, they extracted out of the XII Tables a good deal that was never in them. The
- Equity.** Praetor, at least in later times, had an acknowledged right to supplement, to develop, and even to change the law, but his power was admitted within circumscribed, although somewhat indefinite, limits.
- Legis-
lation.** Legislation, the direct and open change of law on account of its unfitness, is the last to reach maturity. Under the Empire, this came to supersede both the others. It is worthy of remark that England affords a parallel case of development. Customary law, as exhibited in decided cases, equity and legislation have appeared in the same order and fulfilled similar functions in England and in Rome.
- Juriskon-
sults.** THE JURISCONSULTS (*Jurisperiti, Jurisprudentes*). —Until the time of Diocletian, the administration of law was not confided to professional lawyers. It was regarded as a public office that each citizen

might be called upon to undertake. The Praetor was, generally speaking, more of a statesman than a jurist, a politician on his way to the consulship, not, as a judge with us, a middle-aged lawyer retiring from active practice to exercise judicial functions. But there grew up in Rome a class of men who made it their business to know the law and communicate their information to such as sought it. Hence a strange result. The men that knew the law had no direct participation in the administration of justice; the men that administered justice did not know the law.

Pomponius, in his brief account of the history of *Jus Flavianum*, Roman Law, informs us that the custody of the XII Tables, the exclusive knowledge of the forms of procedure (*legis actiones*), and the right of interpreting the law, belonged to the College of Pontiffs. He goes on to say that this continued for a century after the publication of the XII Tables, until Cneius Flavius, a clerk of Appius Claudius, who had written down the forms of actions, abstracted his master's book and published it. This publication was known as the *Jus Flavianum*. Some years later Sextus Aelius wrote a book in three parts (*jus tripartitum*). It gave an account of the XII Tables, of the interpretation of the XII Tables, and of the forms of procedure, and was called *Jus Aelianum*. Tiberius Coruncanius, who

lived about three centuries before Christ, is said to have been the first to publicly profess to give information on law. Until, however, about a century before Christ, the task of answering questions of law fell chiefly on aged patricians who had held high office ; but from about that time the existence of a class of professional juriconsults may be dated.

*Responsa
Prudentium.*

During the Republic it was entirely voluntary for a magistrate to receive, or for any one to give, advice on law. Nevertheless the ignorance of the Praetor and *judices* naturally led them to welcome such assistance as it was in the power of the juriconsults to offer. But Augustus introduced two important changes ; he gave a higher authority to the opinions of the juriconsults, while he admitted to the exercise of the profession only those that had first obtained Imperial sanction. Henceforth the *jus respondendi* was confined to the privileged class of authorised jurists. By their opinions those who administered the law must be guided.

*Writings
of Juris-
consults.*

The authority given to the opinions naturally extended to the writings of the juriconsults. Hence an extraordinary impetus was given to the production of legal literature ; and to the activity that followed during the first two centuries of the Christian era we owe the rich store of juridical reasoning that constitutes the permanent value of the mature Roman Law.

The system begun by Augustus had one drawback. Jurisconsults might give different opinions, and how was the person hearing a cause to determine which was right? So marked became the divisions among jurisconsults, that soon two rival schools grew up (called respectively Sabinians and Proculians), giving opposite opinions on a considerable number of points of law. It was thus in the power of a Praetor or *judex* in many cases to determine his judgment, either for plaintiff or for defendant, according as he chose to follow the Sabinians or the Proculians. Gaius refers to a partial remedy introduced by Hadrian. At a later period (A.D. 426) Valentinian enacted a law, commonly called 'The Law of Citation,' providing that the writings of only five jurists, Papinian, Paul, Gaius, Ulpian, and Modestinus, should be quoted as authorities. If a majority of these held one opinion, that was to bind the judge; if they were equally divided, the opinion of the illustrious Papinian was to be adopted.

From the manner in which the jurisconsults modified the law, it is extremely difficult to specify the changes that ought to be ascribed to them. Their influence was felt in forms of conveyancing. Of these the most generally useful was the fictitious suit (*in jure cessio*), which, although resorted to long before the existence of jurisconsults as a

Law of
Citation.Import-
ance of
Juriscon-
sults.

professional class, was doubtless largely extended by them. The great bulk of Roman Law, and all that is most valuable in it, is due to the juriconsults. A glance at the Collections of Statutes and Constitutions shows how little relatively was the amount contributed by direct legislation.

Praetor's
Edict.

EQUITY.—The Praetor exercised a qualified or limited legislative power. With him all legal proceedings commenced. By him the questions at issue between the parties were put into shape. In a progressive community, where the wants of the people continually tended to go beyond the provisions of the law, it was almost inevitable that the Praetor should exercise on the growth of Roman Law an influence far more powerful, as it was more direct and authoritative, than the influence of the juriconsults. To avoid the evils of uncertainty, a practice grew up of issuing at the time of his taking office a Proclamation or Edict stating the rules by which he would guide himself in granting or refusing legal remedies. This Proclamation was called *Edictum Perpetuum*, in contrast to temporary or occasional Proclamations, which were known as *Edicta Repentina*. Naturally each successive Praetor was content in the main to follow in the footsteps of his predecessors, and the portion of their Edict that he transferred to his own was called *Edictum translaticium* or *tralatitium*.

Until B.C. 66 there was no guarantee, except *Edictum Perpetuum*, constitutional usage, that a Praetor would adhere during his term of office to the rules laid down in his own proclamation; but in that year a statute (*lex Cornelia de Edictis Perpetuis*) was passed, declaring it illegal for a Praetor to depart from his Edict. The growth of this *Edictum Perpetuum* continued vigorously for more than a century after the Empire, although the triumph of the Imperial system involved the destruction of the great elective magistracies of the Republic. Under Hadrian, Salvius Julianus consolidated and arranged the Perpetual Edict; and that work may be taken to mark the end of Praetorian legal reform.

The Praetor stands in Roman Law midway between the jurisconsults and the legislature. His right to alter the law was openly acknowledged, but it was not unlimited. The Praetor was girt round by a firm, although invisible and somewhat elastic, band. He may be viewed as the keeper of the conscience of the Roman people, as the person who was to determine in what cases the strict law was to give way to natural justice (*naturalis aequitas*). But even a wider authority than this was ascribed to him, for he was allowed to entertain general considerations of utility (*publica utilitas*). A single example, however, may suffice to show that the Praetor's edict was confined within real, although

Jurisdiction of Praetor.

indefinable, limits. The XII Tables gave the succession to a father's estate to his children under his *potestas*; the children released from the *potestas* did not succeed. The Praetor, however, did not scruple to admit emancipated children to succeed to their fathers; but it was reserved for later legislation to provide that a child should succeed to its mother.

Results of
Praetorian
action.

The work of the Praetor may be summed up under three heads. It was the Praetor chiefly that admitted aliens within the pale of Roman Law. To him mainly is due the change by which the Formalism of Roman Law was superseded by well-conceived rules, giving effect to the real intentions of parties. Lastly, he took the first and most active share in transforming the law of intestate succession, by which, for the purpose of inheritance, the family was regarded as based on the natural tie of blood instead of the artificial relation of *potestas*.

LEGISLATION.—To give a full account of this topic would be to write the constitutional history of Rome; suffice it here to mark a few distinctions that are of importance in looking at the historical development of Roman Law.

Legis-
lation.

During the Republic, the Popular Assembly was the fountain of legislation;¹ during the earlier his-

¹ A statute (*lex*) is what the Roman people (*populus*),

tory of the Empire, the place of the Popular Assembly was gradually taken by the Senate, acting as the mouthpiece of the Emperor ; finally, even this form was dropped, and all enactments flowed directly from the Emperor.

During the Republic three Assemblies of the Roman people existed. The oldest was the *Comitia Curiata*, a patrician body, of which we have reminiscences in the law of adoption and of wills. The *Comitia Centuriata*, said to have been originated by one of the Kings, Servius Tullius, included the whole Roman people, Plebeians as well as Patricians, arranged in classes according to their wealth, but so as to give the preponderating power to the richest. The *Comitia Tributa* was based on a local division of the people, the

Republi-
can As-
semblies.

when asked by a senatorial magistrate—a Consul for instance—ordered.

A decree of the commons (*plebiscitum*) is what the commons (*plebs*), when asked by a magistrate of the Commons—a Tribune for instance—ordered. The commons (*plebs*) differ from the people (*populus*), as species does from kind (genus); for the name ‘people’ means the whole of the citizens, counting the patricians and senators as well. But the name ‘commons’ means the rest of the citizens without the patricians and senators.

A *Senatus Consultum* (decree of the Senate) is what the Senate orders and settles. After the Roman people grew so big that it was hard to bring them together on one spot in order to ratify a law, it seemed fair that the Senate should be consulted instead of the people.

vote being taken by wards. In this assembly the influence of numbers predominated. Livy mentions a *lex Valeria Horatia* (B.C. 449) as giving effect to a compromise between the Patricians and Plebeians, whereby it was agreed that the enactments of the *Comitia Tributa* should bind the whole people. Another law (*lex Publilia*, B.C. 339) seems to have provided that the ordinances of the Plebeians should be law only with the concurrence of the Senate: the *lex Hortensia*, B.C. 286, gave full effect to the *plebiscita* without the Senate. Very often *plebiscita* (such as the *lex Aquilia*) are called *leges*, a term that in strict propriety ought to be confined to the enactments of the people (*populiscita*).

Imperial
legisla-
tion.

The sovereign power was exercised by the Emperors in three ways: (1) by direct legislation, *edicta, constitutiones*; (2) by judgments in their capacity as the Supreme Tribunal (*decreta*); and (3) by *epistolae* or *rescripta*, giving advice on questions of law in answer to inferior judges. This authority seems to have been conferred by statute (*lex regia*) at the beginning of each reign. The law by which Vespasian was invested with supreme power was discovered in the 14th century; and it shows that the legal foundation of the Emperor's power was a statute.

First
Codes.

The constitutions of the Emperors were col-

lected at different times. The oldest collection is the *Codex Gregorianus et Hermogenianus*, which covers a period of about 200 years, from Hadrian to Constantine. Only a few fragments of it remain. From this period to the reign of Theodosius II. the constitutions are gathered in the *Codex Theodosianus*. This was made by a commission (consisting of sixteen members), appointed A.D. 435, which took three years to the work. It was sent by Theodosius to his son Valentinian III., who accepted it for the Western Empire, and presented it amid acclamation to the Senate. The Theodosian Code has small pretensions to scientific classification. The separate constitutions are collected under titles indicating their subject-matter: these titles are collected in sixteen books. It has come down to us almost complete.

The reign of Justinian marks the culminating period of Roman Law. The production of law had in a great measure ceased before his time, but by a very remarkable series of enactments, Justinian accomplished a marvellous work in cutting away anomalies and giving completeness and symmetry to the body of the law. The chief minister in these reforms was Tribonian, Quaestor of the Palace, who died A.D. 545. Justinian was scarcely seated on the throne when he began the work that has given him such renown. On the 13th

Justinian's
Codes.

Feb. 528, a commission of ten members was appointed to draw up a Code like the Theodosian Code. In scarcely more than a year (7th April 529) the work was done. This Code, called the *Codex Vetus*, was superseded by a later edition, and has been entirely lost.

Pandects.

On the 15th Dec. 530, a commission of sixteen members with Tribonian at their head was appointed for a new task—nothing less than to bring within a moderate compass and arrange in order the vast accumulation of law that had grown up under the hands of Jurisconsults and Praetors. The commission proceeded to deal with the works of 39 jurists, consisting of nearly 2000 books and 3,000,000 verses. In the course of only three years this pile of material was sifted and reduced to about one-twentieth of its original bulk. The scraps or fragments of the jurists were placed under titles, and these were collected in fifty divisions or books. The titles are arranged in the order of the topics of the *Edictum Perpetuum* as it was shaped by Salvius Julianus. The arrangement of the fragments under the titles seems to have been mechanical. The commission divided the writings of the jurists into three classes, and assigned each class to a separate sub-committee. The first class, called Sabinian, embraced all the systematic treatises on the *jus civile*; the second,

Blume's
discovery.

called Edictal, consisted of the Praetor's Edict, with commentaries on it; the third, called Papinian, was formed of the writings of Papinian and the record of cases. Each sub-committee arranged its collections independently, and when they came together to arrange the titles, they took for the first group that which had the most numerous, and for the last that which had the least numerous fragments. Such at least is the conclusion that has been drawn with much ingenuity by a German jurist (Blume) from the distribution of the fragments. The finished work was called *Digesta* or *Pandecta*, and on the 30th Dec. A.D. 533 it obtained the force of law.

In the beginning of A.D. 533, a new commission ^{Institutes,} was appointed of law-professors and advocates to prepare an elementary or preparatory text-book. The commission adopted the Institutes of Gaius as a groundwork, and the Institutes of Justinian are little more than a new edition of Gaius, with such omissions and additions as were necessitated by the lapse of more than three centuries. The Institutes of Gaius were recovered in 1816 by Niebuhr. Of Gaius himself almost nothing is known. Even his name is lost, Gaius being merely a praenomen. Notwithstanding the *lacunae* that still exist, his work is valuable in reference to the antiquities of Roman Law.

In the preparation of the Digest, many controverted points turned up, some of which were referred to Justinian for decision. The number of such questions that arose before the Digest was finished was fifty. They were at first collected separately, and called the *Quinquaginta Decisiones*.

After publishing the Pandects and Institutes in A.D. 534, a commission was appointed to revise the old Code, and incorporate the new constitutions and decisions. This revision was completed in the same year, and confirmed on the 16th Nov. 534.

Novels. Justinian found his zeal for law reform by no means stifled by these great works, and some of the most important enactments, especially relating to intestate succession, were published afterwards. These subsequent laws are called *Novellae*.

CHAPTER II.

THE LAW OF PERSONS.

SECT. I.—SLAVES AND FREEDMEN.

THE institution of slavery is ancient and world-wide, but it varied greatly in character and malignity. Among the ancient Hindoos slavery existed, but the number of slaves seems to have been small ; and the indulgence shown by the Hindoo law to the slave contrasts favourably with the harsh theory and practice of the Roman people. But Roman slavery, at its worst, was a humane institution compared with the slavery of the negroes in America, until the civil war of 1860-64. American slavery was a compound of everything that was vile in the laws of various states of antiquity, without any of the redeeming features usually found associated with slavery when it was still a primitive institution. In Rome the difference between master and slave was not embittered by prejudices of race or colour. Slaves were of the same race as their masters—not seldom well educated, and

General
Character
of Ancient
Slavery.

filling posts of a high and confidential nature. Slavery was regarded as an accident or misfortune that might befall any man, not as the natural and indelible condition of an inferior race.

Legal
position
of Slave.

In the olden times, when Rome consisted of a small colony of peasant proprietors, few of whom would be rich enough to possess slaves, slavery was a domestic institution, and the slave, in no trivial sense, a member of the family. Indeed, ancient law makes little difference between sons, wives, and slaves. The children, the wife, and the slaves of a Roman head of a house (*paterfamilias*) were equally subject to his unrestricted power, and equally outside the jurisdiction of the State. If any of them did wrong, not they, but the head of their house, had to answer for it in the Courts of the State. In compensation for this liability, he had the power to surrender the offending person, as a species of slave, in satisfaction to the complainant (*noxalis deditio*).

Amelio-
ration of
Slavery.

The rise of the imperial power in Rome, while it depressed the free citizens, was not unfavourable to the slave. Before the end of the Republic, a statute (*lex Cornelia*, B.C. 81) was passed, making it murder for a person other than the owner to kill a slave, but it was reserved for the Emperor Claudius to make the crime equally murder when it was committed by the master. Antoninus Pius,

a devout follower of the Stoics, signalled his reign by a law providing that masters who ill-used their slaves should be forced to sell them ; it was even, he said, for the interest of masters themselves that relief should not be denied to the victims of cruelty, or starvation, or unbearable ill-usage. But although thus protected from ill-treatment, slaves were not entitled to the privilege of family life, or to rights of property. A union between a male and a female slave (*contubernium*) was not a marriage ; but the offspring, if they afterwards acquired their freedom, were recognised by the law as related in blood. Under the title of *peculium*, a slave, with his master's permission, might have the enjoyment of property. Whatever a slave might have as *peculium*, whether the savings from exceptional industry, or gifts as a reward of extraordinary services, was protected by custom and public opinion, although not by law. This protection seems to have sufficed, for the cases were not rare in which the slave was able to buy his freedom out of the accumulations of his *peculium*. *Peculium.*

Persons were sometimes made slaves as a punishment for civil wrongs, but the two chief sources of the supply of slaves were capture in war, and birth. According to the barbarous law of war in ancient times, every prisoner of war was made Captives
in War.

Slavery
by Birth.

a slave.* This was justified on the ground that it was an improvement upon the still more ancient practice of putting all prisoners of war to death. Again, slavery was hereditary. The children of a female slave were the slaves of her master. It was immaterial whether the father was free or a slave. But though hereditary, slavery was not indelible. Slaves might be manumitted by their masters, and admitted as citizens of Rome.

Formal
Manu-
mission.

During the Republic, manumission was a formal act (*publica, solemnis*), having the twofold effect of releasing a slave from servitude and enrolling him among the citizens. It required the concurrence of the master and a magistrate, as representing the State. A rare and transient mode was the inscription of the slave's name on the roll of citizens by the Censor at the quinquennial census. But the principal modes were two—one by which the slave was freed in the lifetime of the master, the other whereby freedom was bequeathed as a legacy. The first was called manumission *per*

* A Roman captured by the enemy was considered by the Roman Law to be lawfully a slave. But if he effected his escape, and returned to his own country, he was placed, according to the fiction of *postliminium*, as far as possible, in the same position as if he had never been captured. If a *paterfamilias*, he recovered the *potestas* over his family, and the episode of slavery was for the purposes of law obliterated. The doctrine of *postliminium* was also applied to property taken by an enemy, when recovered.

vindictam, a fictitious suit, in which a person claimed that the slave was freeborn. The master admitted the claim, the magistrate made a decree establishing the freedom of the slave, whereupon the master touched the slave with a rod (*vindicta*), and turning him round three times, let him go. Originally testaments were made in the *Comitia* by the authorisation of the people in the usual form of legislation. In this case, the consent of the master and the authority of the people combined to enable a testator to confer freedom and citizenship on his slave. This privilege was continued when the testament was not made in the *Comitia*, but became a private act, an instance, of which the history of law records not a few, where an incident attached to an act continues to be attached to it after the reason for its existence has gone.

At first no other mode of manumission was allowed. The clearest expression of a master's intention to liberate his slave had no effect unless it was clothed with the proper legal formalities. This led to inconvenient results. If there were a flaw in the manumission, a master might respect his own intention and allow his slave to live in freedom, but his heir, standing on the strict technicality of law, might reclaim him back into slavery. At some time not precisely known the Praetor interfered to prevent the scandals that might flow

*Latini
Juniani.
Dedititii.*

Non-formal Manumission.

from such a state of the law, and protected the liberated slave in the enjoyment of his personal freedom, although not of his property. In A.D. 19 the *lex Junia Norbana* declared that persons so imperfectly manumitted should enjoy higher rights—the same as *Latini coloniarii*. Persons enjoying freedom under the provisions of the *lex Junia* were henceforth called *Latini Juniani*. They were free, but not citizens, and were subject to various disabilities. If the slave had before manumission been put in chains as a punishment, or otherwise dealt with as a debased person, the *lex Aelia Sentia* (A.D. 4) provided that when manumitted he should be subject to the disabilities of *peregrini dedititii*, and be incapable of becoming a citizen. Before the time of Justinian, however, this portion of the *lex Aelia Sentia* had fallen into disuse, and the name of Latins was rarely heard. Justinian abolished both *Latini Juniani* and *dedititii*, and enacted that whenever a master desired to give freedom to his slave, whether the old forms were observed or not, the slave should become a citizen as well as free.

Restraints on Manumission.

In the time of Justinian a master was not restricted in the number of slaves he might manumit, unless he released them with the intention and the effect of defrauding his creditors. The other provisions of the *lex Aelia Sentia* requiring a master

to be twenty and the slave thirty years of age, unless for special reasons manumission was allowed by a public body, were repealed by him. The *lex Furia Caninia* (A.D. 8), which prohibited a master from manumitting by will more than a certain proportion of his slaves, was also swept away by Justinian.

Manumission did not wholly break the bond that united the slave to his master. The relation of master and slave was replaced by the relation between patron (*patronus*) and freedman (*libertus*). The freedman could not sue his patron without first obtaining the consent of the Praetor. The freedman, if he had the means, was bound to support his patron if he fell into poverty. If the freedman had no children of his own, he was bound to leave a portion of his property to his patron; and if he died without a will and without children, his patron inherited all his goods. Besides, it was usual, as the price of the slave's freedom, that the master should stipulate for a certain amount of work from the freedman. Generally, the freedman worked so many hours in each day. If the patron did not find him food and clothes, he must allow him sufficient time to procure a maintenance for himself. The kind of work was the same as the freedman had been accustomed to as a slave, or any trade he might afterwards learn.

Patron's
Rights.

SECT. II.—PARENT AND CHILD.

Powers
of Pater-
familias.

The powers (*patria potestas*) enjoyed by the head of a household in Rome over his children are scarcely, if we look to the earlier period of the Republic, distinguishable from the rights exercised over a slave. The paterfamilias had, to use the language of the old law, the power of life and death (*jus vitae necisque*). While his father lived, a son could not hold any property, and, however mature his age, could not marry without his father's consent. In early times the father could pawn his children; and a provision of the XII Tables, declaring the paternal power to be forfeited if the father pawned his children thrice, was turned by the ingenuity of the juriconsults into a means of emancipation. While the Republic lasted, the paternal power was restrained only by public opinion; but under the Empire, it was curbed by the stronger hand of the law. Constantine (A.D. 318) enacted that if a father slew his son, he should suffer the death of a parricide, that is, be tied up in a sack with a viper, a cock, and an ape, and be thrown into water and drowned.

Separate
Property of
Children.

Considerable progress also was made under the Empire in conferring upon children under the father's power partial rights of property. Thus a son was allowed to keep as his separate property

(*peculium castrense*) whatever he acquired as a soldier, and this privilege, under the name of *peculium quasi-castrense*, was extended to many of the higher officials of the civil service in respect of their salaries. Finally, Justinian enacted that the father should take only a life interest in respect of every acquisition of a child, except what the child obtained through using his father's property (*peculium profectitium*). The interest of the child in such acquisitions was called *peculium adventitium*.

The Roman family, in the eye of the law, was based on the paternal power. It formed an *imperium in imperio* older than the State. The Roman's house was, in the strictest sense, his castle. The officers of the State did not dare to cross his threshold, and assumed no power to interfere within his doors. The head of the family was its sole representative; he alone had a *locus standi* in the tribunals of the State. If a wrong was done by or to any member of the family, he and not they must answer for it, or demand compensation; if property gained by them were appropriated by another, he, and not they, could reclaim it; if a contract was made with one of them, he alone could sue upon it. The family lived under one roof, had one purse, one altar and one worship. It was this common life and jurisdiction that constituted in the eyes of the early Roman the very

Constitution of
Roman
Family.

essence of the family. A daughter marrying and entering into another household, and becoming subject to a different authority, was no longer regarded (for legal purposes) as a member of the family in which she was born. Her children likewise were strangers to her father's hearth, and not legally of kin to those who continued under his roof. Again, sons released from their father's power by emancipation, ceased to be members of his family. On the other hand, grandchildren descended from sons unemancipated, were in the power of their grandfather, while he lived, and fell on his death under the power of their own father. Even strangers by birth could become members of the family by adoption, and the law originally recognised no difference between them and the offspring of the head of the house.

Acquisition of *potestas*. The paternal power was acquired—(1) by birth, (2) by legitimation, and (3) by adoption. The offspring of a legal marriage were in the power of their father. To this union only citizens could be parties; if either party was not a citizen, their union was recognised as a marriage for many purposes, but not for giving the *patria potestas* to the father. Caracalla extended Roman citizenship to all the subjects of Rome, and accordingly, in the later Roman law, questions as to citizenship did not arise. Constantine introduced *legitimatio per*

subsequens matrimonium, by which in certain cases children born out of wedlock fell under the power of their father by his subsequent marriage with their mother. Owing to various causes a species of morganatic marriage grew up in Rome. The legal marriage of the Romans was impeded at different periods by arbitrary restrictions, within which the impulses of human affection could not always be confined. A son or daughter could never marry without their father's consent; and at one time marriage was forbidden between the freeborn and freedmen or freedwomen. Such restrictions did not apply to concubinage, which was, like marriage, a permanent union of one man with one woman, although considered not so honourable, especially on the part of the woman. It was to children born of such a union, and to them only, that legitimation applied. By the subsequent marriage of their parents, they fell under the power of their father. Legiti-
mation.

Until Justinian altered the law, adoption was a mode of acquiring *potestas*. He enacted that it should continue to have that effect only when a father adopted a child, or a grandfather adopted a grandchild; and that in all other cases adoption should not confer the *potestas*, but give the adopted child merely a right of succession in case the adopter died without leaving a will. In the Adoption.

time of Justinian adoption was nearly as much out of harmony with the requirements of social life as it is now. But adoption occupies an interesting place in the history of law. It formed an intermediate stage of progress between the ancient law, which recognised nothing but intestate succession and the later law, which possessed in the Will, a more perfect instrument to settle the devolution of an inheritance. The oldest form of adoption (*arrogatio*) was effected by the legislative authority of the *Comitia*. Only persons who were not under any one's power (*sui juris*) could be adopted in this way. By taking advantage of the provision of the XII Tables, declaring a forfeiture of the *potestas*, if the father thrice pawned a son, and by calling in aid a fictitious suit (*cessio in jure*), persons were enabled to adopt those who were *alieni juris*, that is, under some one's power. In later times, arrogation was effected by rescript of the Emperor, and simple adoption by a declaration in the presence of a magistrate.

Emanci-
pation.

The paternal power was dissolved by the death of the paterfamilias, or by any thing that deprived either father or child of the status of a Roman citizen. It could also be terminated at the will of the father, by a declaration before a magistrate. This simple act replaced the elaborate proceedings that anciently were required for the emancipation

of a child. Here it may be sufficient to observe, without going into somewhat intricate detail, that the last stage in the process of emancipating a son was precisely the same as occurred in the manumission of a slave. From this a singular consequence followed. The duties and rights of an emancipated son were identical, except in one point, with those of a freedman. The father could not exact a promise of work from his son ; the son owed his father reverence, said the Praetor, not menial work. The emancipated son could not sue his father, except in a fit case, and with the leave of the Praetor ; he was bound to maintain an indigent father. The father, in like manner, was bound to support an indigent son. The relation of a father to an emancipated son governed the wider relation of parent and child. The obligations between a parent and child, where the *potestas* did not exist, were the same as the obligations between a father and his emancipated child.*

* *Capitis deminutio*. — *Caput* included three elements, freedom, citizenship, and family rights. The loss of freedom, as when a person was captured by an enemy, was *maxima deminutio capitis*. The loss of citizenship, as by the punishment of deportation to an island, was *media* or *minor deminutio capitis*. A change of family, by adoption, or arrogation, or emancipation, was a *minima deminutio capitis*.

SECT. 3.—HUSBAND AND WIFE.

Wives *in*
manu.

While the powers of the Roman father over his children appeared even to the Romans themselves as singular, the relation that subsisted between husband and wife during the greater portion of the Republic and the whole of the Empire, presents in a different way an equally conspicuous contrast with the laws generally prevailing in Christendom. There was, indeed, a stage in the history of Rome when the position of a wife was almost identical with that of a slave or child under the paternal power. A wife *in manu viri* could enjoy no rights of property, and she was described, not inaccurately, from a technical point of view, as the daughter of her husband. The marital power (*manus*) appears under two aspects. On the one hand it had a reverential and religious aspect. It was created by a religious ceremony (*confarreatio*), and only the offspring of such a union were eligible as candidates for the higher priestly offices. Here the subjection and dependence of the wife were hallowed by religious associations. On the other hand, the Roman *manus* shows a baser, and perhaps more intelligible, origin. The woman was sold to the husband, and conveyed by the same forms as if she were a slave. So strictly was the wife assimilated to property, that

if she were delivered to the husband without the proper forms of conveyance, she did not fall under his *manus* until the usual period of prescription had passed. It was by taking advantage of this circumstance that the Romans were able to get rid of the *manus* almost entirely. A title by prescription could not be acquired unless the possession were continuous ; and accordingly, if a wife absented herself, and returned to her father's house before the year of prescription had run out, the prescription was broken. So early as the XII Tables, this mode of avoiding the *manus* had acquired the constancy of a custom. They contain a provision fixing three nights as the extent of absence that prevented the husband acquiring *manus* by prescription. The *manus* had almost disappeared before the end of the Republic, and under the first emperors was looked upon as a mere antiquarian curiosity.

The mode of escape from the *manus* was one that did not merely mitigate or alleviate the harshness of female subjection, but one that wholly swept it away. A wife was either in the *manus* or out of it. If she was *in manus*, the despotic powers of the husband knew scarcely any limit ; if she was not, the wife remained in the power of her father—in law a member of her father's family—and wholly free from

Status of
Wife.

the power of the husband. Thus the only legal consequence of a marriage was that the offspring were under their father's power, and enjoyed rights of inheritance ; between husband and wife there was no bond of legal duty. The wife could not compel her husband to maintain her ; the husband had no rights to the wife's property, except such as were given him by prenuptial contract.

Divorce. If the husband or the wife were not satisfied, the remedy was divorce. It was not necessary to obtain the authority of any tribunal for the dissolution of the marriage ; by a simple formal intimation either party could at once terminate the union. While the Roman jurists gloried in the ancient maxim of their law that marriage should be a free union, the ecclesiastics, who acquired an influence over legislation by the conversion of the Emperor Constantine, set themselves with inflexible resolution to uproot the ancient freedom. Upon the principle of divorce by mutual consent they were unable to encroach, but they succeeded in obtaining enactments from successive emperors confining the right of repudiation by one party alone to cases where the other had been proved guilty of gross misconduct.

Custody of Children. If neither party was in fault, the general rule seems to have been that the father took the custody of the boys, and the mother of the girls ; if the

divorce was owing to the fault of the father, the wife was entitled to the custody of the children, and the father was obliged to maintain them; if the mother was in the wrong, the father obtained the charge of the children.

The peculiar conflict that emerges in the Roman *Dos*. Law between the rights of the father and of the husband is connected with an institution that has exercised a vast social and economical influence. Marriage gave the husband no claim of any sort upon the wife's property. But he was under no obligation to maintain her. The Roman point of view seems to have been that it was the duty of a father to maintain his daughter, notwithstanding that she was married. But as it would have been practically impossible to perform this duty day by day and week by week, when the daughter lived under her husband's roof, the father once for all compounded with the husband by giving him a sum down. This sum was called *dos*. By a statute (*lex Julia*), which dates from the transition period between the Republic and the Empire, every father was compelled, on the marriage of his daughter, to give her a *dos* if he had the means. The husband enjoyed the use of the property during the marriage, but on its dissolution, whether by death or divorce, the property reverted to the wife's father. If the *dos* was given by a paternal ancestor, it was said to be

profectitia; if it was given by the wife herself, or by any other person than a male ascendant, it was called *adventitia*. When a person so gave a *dos*, it was understood to be a present to the wife after the dissolution of the marriage, unless it was specially agreed that it should revert to the donor, in which case it was called *receptitia*. There are distinct signs that in the beginning the husband's rights over the *dos* were more extensive than they afterwards became, and the tendency of the later law was to restrict the husband rigorously to the income of the property, and not to give him power of disposing of the capital. Thus he could not sell or mortgage his wife's lands even with her consent.

*Donatio
propter
Nuptias.*

The *dos* was usually the subject of a prenuptial contract; but it might be commenced or increased after the marriage. During the later empire, a settlement might be made on the wife by the husband of a nature corresponding to the *dos*, and was called *donatio propter nuptias*. The predecessor of Justinian allowed such gifts to be increased after marriage, thus breaking in upon a rule very jealously guarded by the older law, that no gifts were binding between husband and wife. A gift by a husband to a wife, or by a wife to a husband, could be revoked by the donor at any time during life. The provisions

of the Roman Law thus furnish a singular contrast to the leading characteristics of an English marriage settlement. A settlement usually gives an interest in the property to the offspring of the marriage; but in Rome the children had no interest in the *dos*. By the clause in restraint of alienation, a wife is prevented from giving away the capital of her property to the husband, but it is only by depriving her of the power of alienation in regard to everybody else: while the English law makes no provision to protect feeble husbands from avaricious or extravagant wives.

English
Marriage
Settle-
ment.

SECT. IV.—TUTORS AND CURATORS.

The office of tutor in the Roman Law approaches nearly to that of a trustee. The tutor was appointed to act on behalf of children under the age of puberty, but his duties differed considerably from the duties of an English guardian of children. The tutor did not himself undertake the custody and education of the pupil entrusted to his care. If the will appointing the tutor did not name any person for that duty, the mother of the children was entitled to the custody of them so long as she remained unmarried. It was only under special circumstances that the tutor could determine the sum to be allowed to his pupil for maintenance; as a general rule, unless it were

Functions
of Tutor.

fixed by the will, the sanction of the Praetor must be obtained. The duty of the tutor was to manage the property of the pupil, and authorise him to bind himself by contract (*et negotia gerunt et auctoritatem interponunt*, Ulp. Frag. 12, 25). In dealing with the property of the pupil, the tutor was subject to rules such as now govern trustees. He was bound to make good all loss sustained by his neglect or wilful wrong ; he was bound to take such care and so manage the property as a good head of a family would manage his household affairs ; he could charge nothing for his services, and he was not allowed to obtain any advantages for himself, but must exercise all his power for the sole benefit of the *pupillus*.

Disabili-
ties of
Pupil.

Although a pupil had no property, he nevertheless had need of a tutor. A child could not bind himself by contract, and there were some legal transactions, as acquiring an inheritance, which although in a particular case they might be wholly beneficial to him, yet required the authority of a tutor. The simplest course would have been to hold that no person under the age of puberty could enter into any legal transaction ; and to make the tutor a statutory agent, whose acts within the scope of his authority should bind the pupil's estate. That was not the theory of the Roman Law. The theory was as far as possible

to make the child the actual contracting party, but not to bind him unless the tutor was present to give his consent (*auctoritas*). Until the child passed his seventh year, and entered on his eighth (*pubertati proximus*), he was not considered capable of so binding himself, even with his tutor's authority ; accordingly, if any action were brought by or against the *pupillus* up to that age, the tutor acted for him in his own name ; but if he were above seven, the suit went on in the name of the pupil, the tutor merely giving his sanction. The rule prohibiting a tutor from getting any advantages from his trust, equally prevented the validity of any contract by which he authorised an obligation beneficial to himself (*regula est juris civilis, in rem suam auctorem tutorem fieri non posse*).

The general rule determining the incapacity of a child was that he might better his condition, even without the authority of the tutor, but he could not make it worse, unless he had his authority. In such contracts as create obligations for both contracting parties, as sale or letting to hire, if the tutor did not give his authority, those that contracted with the pupil are themselves bound, but he is not in turn bound to them. This rule was subject, however, to equitable restrictions in favour of the contracting party. A pupil could throw up a purchase, but he could not keep what he had

Contracts
of Pupil.

bought and refuse payment, or demand back what he had sold without giving up the price.

Appoint-
ment of
Tutors.

Tutors were appointed by will or upon intestacy ; failing both, by the magistrate. At first testamentary tutors could be nominated only by a *paterfamilias* to those under his power ; but the Praetor confirmed, either as of course, or upon inquiry as to the fitness of the tutor, the appointment by a father who had not the paternal power, or by a mother. Failing testamentary tutors, the kin were obliged to undertake the duty to the children (*legitimi tutores*). In the ancient law, the agnatic kin thus succeeded ; but Justinian left it to the next of kin, whether agnatic or cognatic. In default of kin, the *Lex Atilia* (B.C. 197) gave the urban Praetor and a majority of the tribunes of the Commons the power of appointing tutors, and the *Lex Julia et Titia* (B.C. 31) gave a similar power to Presidents of Provinces. Appointments under those statutes fell into disuse, and in the time of Justinian the Prefect of the city of Rome, or the Praetor, and, in the Provinces, the Presidents, after inquiry, or the magistrates, by order of the Presidents, appointed tutors (*tutores dativi*).

Exemp-
tions from
Tutela.

The office of tutor was obligatory on those who were duly nominated. But the inconvenience arising from that rule led to the establishment of numerous exceptions (*excusationes tutorum*), which are

minutely described by Justinian, but are of little interest at the present day. Before entering upon the discharge of his duties, the tutor, if *legitimus*, was required to give security: testamentary tutors were exempt from giving security; in the case of those appointed by the magistrates, after inquiry, none was required; but those appointed by the inferior magistrates must give security.

The tutela ended with puberty, which was fixed at twelve for girls and fourteen for boys. But even before that, tutors could be removed by the Court for misconduct or unfitness. End of Tutela.

The old law, which made puberty the age of legal majority, was obviously defective. Accordingly, while in strictness every legal act by a person above the age of puberty was valid, a practice grew up of rescinding (*restitutio in integrum*) any bargains or conveyances made by persons above puberty, but under twenty-five, if the contract was an imprudent one for the minor. This cure might have been worse than the disease, had it not been that a minor could obtain the appointment of a curator, whose consent to the transaction, given in like manner with the consent of a tutor, made it unimpeachable. But except for that purpose it was not essential that curators should be appointed to minors. Curators could be appointed also to lunatics, the deaf, the dumb, incurables, and spend-

Minors.
Curators.

thrifths. Spendthrifths (*prodigi*) were those who, in consequence of wasting their property, were prohibited by the Praetor from the management of it. The duties and mode of appointment of curators are almost exactly the same as in the case of tutors.

CHAPTER III.

THE LAW OF PROPERTY.

SECT. I.—OWNERSHIP.

THERE is no point on which the theoretical ^{Origin of Property.} speculations of writers like Blackstone have been more completely falsified than the question of the origin of property. The suggestion that ownership arose when men began to respect the rights of the first occupier of what was previously appropriated by no one, is curiously the reverse of the truth. Conclusive evidence has been brought forward to show that when ownership is first recognised, it is not ownership by individuals, but ownership by groups—the family, the village or commune, the tribe or clan. Individual property arose from the breaking up of such groups, and the distribution of the rights of the whole among the members. In some cases this process was hastened by wars. There are distinct traces that individual property was pre-eminently that which the warrior had seized as the spoil of

victory; among the Romans, for example, the spear was the highest symbol of property.

Ancient
Commun-
ism.

But the student of Roman Law will learn nothing of this widespread primeval communism from the works of the Roman jurists. From the earliest times of which we have a record, the institution of private property was completely developed in Rome, and hence the singular influence it has exerted on the destinies of European nations.

Defects of
Old Law.

The law of property in Rome was in the beginning marked with two characteristics which became increasingly inconvenient as her empire extended. The modes of conveying property were ceremonial and cumbrous, and only citizens of Rome could be owners. Few articles of any importance in ancient times could be conveyed without mancipation, a ceremony thus described by Gaius :—

Manci-
pation.

‘*Mancipatio* is a fictitious sale; and the right is peculiar to Roman citizens. The process is this :—There are summoned as witnesses not less than five Roman citizens above the age of puberty, and another besides, of the same condition, to hold a balance of bronze, who is called the *libripens*. He who receives the object *in mancipio*, holding a piece of bronze (*aes*), speaks thus :—“I say this slave is mine *ex jure Quiritium*, and he has been bought by me with this piece of bronze and balance of bronze.” Then with the piece of bronze he strikes the balance, and gives the piece of bronze, as if the price to be paid, to him from whom he receives the object *in mancipio*.’—(G. I, 119.)

The objects that required mancipation included not merely land and houses, but slaves and beasts of draught and burden. *Res man-*
cipi.

When a *res mancipi* was delivered to a buyer without *mancipatio*, the ownership still remained with the seller. But according to the old law, this evil was not without a remedy. For it was held that where a man possessed a thing in good faith for two years in the case of land or houses, and for one year in the case of other things, he became owner by prescription (*usucapio*). Lapse of time thus served to cure defective titles in all cases where a mere informality stood between a man and the ownership to which he was entitled. One difficulty alone remained. If the possessor by accident lost possession of the thing before the time of *usucapio* had run out, he could not sue as owner, because his title was not yet complete. This defect was removed by a Praetor of the name of Publicius (who may have been the Quintus Publicius said to have been Praetor in B.C. 66 by Cicero), who gave an action (hence called *actio Publiciana*) to a possessor under those circumstances. Henceforth the position of a possessor of a *res mancipi* delivered without mancipation was for all practical purposes as good as ownership. Even before his title was perfected by *usucapio*, he was secured in the practical

Res man-
cipi.

Quiritarian
and Boni-
tarian
Ownership.

enjoyment of the ownership. This form of ownership is called by Theophilus—the first commentator on the Institutes of Justinian—Bonitarian ownership, to distinguish it from Quiritarian ownership (*dominium ex jure Quiritium*). When at length *mancipatio* fell into disuse, before the time of Justinian, the distinction vanished, and all kinds of property, moveable or immoveable, were transferred by simple delivery.

Possession. The second great defect of the old Roman Law
Aliens. was more difficult to remove. At first no stranger had any *locus standi* before a Roman tribunal: he could not hold property, or make a contract, or even sue for a wrong. This exclusive system was inconsistent with the world-wide dominion Rome was destined to achieve; and in nothing is the legal genius of the Roman people more conspicuous than the skill with which they made the narrow principles of the ancient law yield to the necessities of the law of progress. In the case of ownership the process by which aliens were secured in the enjoyment of rights of property was simple but effective. The Praetor could not give to aliens the *dominium ex jure Quiritium*, but he could use his power to secure them in the actual enjoyment of the objects of property. He could punish anyone who trespassed on the alien's land, or who attempted to eject him from his holding. It was

part of the policy of the Praetor's innovation scrupulously to respect names, while altering things ; and thus he professed not to give ownership, but only *possessio*. To protect this possession, the Praetor granted special actions, called Interdicts. Possession was thus ownership in substance, in everything but in name. Such is the simple explanation of a subject that has introduced more confusion into jurisprudence, and been the occasion of calling into the world more cart-loads of learned legal and metaphysical treatises, than all the other topics of Roman Law put together.

The dispute into which the ceremony of *man-*
cipatio fell, and the anxiety to make simple delivery <sup>Transfer
by De-
livery.</sup> suffice for the conveyance of all kinds of property, was strengthened remarkably by the Praetorian law of Possession. Delivery was the natural mode of transferring possession. Delivery was thus the authorised mode of conveying the species of property recognised by the Praetor ; and even Roman citizens were glad to rest content with this conveyance and the rights it conferred. To accidents such as these the Romans owed the fact that the only mode of transferring Ownership was the delivery of possession, a mode which although not inappropriate in the case of moveables, became inconvenient when it was sought to convey lands

Symbolical
Delivery.

at a distance (*Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*, C. 2, 3, 20). Delivery took place, of course, by actual transfer of physical possession ; but without that, it might be effected by placing the thing within view of the person to whom it was meant to be transferred, and declaring that he was free to take possession (*longa manu*). Delivery of the keys of a house or warehouse was sufficient to transfer the property either in the house itself or its contents. Putting marks, as upon logs of wood, was another way of effecting legal delivery, where it would have been difficult to have an actual dealing with the physical possession. To deliver a thing at a man's house was considered the same thing as delivery to himself. If the person to whom it was sought to transfer the ownership was already in actual possession, the ownership could be transferred by a mere expression of a wish to that effect by the owner. That was called *brevi manu*. Mere physical delivery, it must be borne in mind, did not alone transfer the ownership ; it did so only if the owner made the transfer with that intent. In the case of sale, something more was required. The buyer did not become owner by delivery even, unless the price were paid or the vendor gave the buyer credit.

Delivery
in English
Law.

The English law of sale offers a conspicuous

contrast upon this point to the Roman Law. Delivery is not necessary in the English law to transfer the ownership of the thing sold. Whether upon a contract of sale the goods pass to the buyer with or without delivery, is a question solely of the intention of the parties. If that intention is expressed, there is an end of the controversy. Generally speaking, however, no intention is expressed, and then certain presumptions of law come in. If specific ascertained goods are sold unconditionally, the property immediately vests in the buyer, unless it can be shown that such was not the intention of the parties. If the goods are not ascertained, no property passes until they are identified or 'appropriated' in terms of the contract. If specific goods are sold subject to a condition, the general rule is that the property does not pass until the condition is fulfilled.

If the person who delivered a thing was really the owner, then the delivery at once operated to give the ownership to the transferee. If he was not owner, the delivery had not that effect, because no one can transfer to another greater rights than he has himself. (*Nemo plus juris ad alium transferre potest quam ipse haberet.*) The defect was curable by prescription. If a person at the time when any thing was delivered to him did not know any defect in the title of the transferror, and

believed that he obtained the ownership, he was said to be a *bona fide possessor*, and was in a condition to become owner if he continued in possession for the time required by law. Justinian fixed the period at three years for moveables ; ten years for immoveables, if both the possessor and the person claiming adversely lived in the same province during the whole time ; and twenty years if during the same period they lived in different provinces. But the possession must be uninterrupted. This did not mean that the articles should not change hands. Each person who took the thing in ignorance of any defect in the title could add to his own time of possession (*accessio possessionis*) the times of possession of all his predecessors who were in the same blissful ignorance.

Stolen
Goods.

In the case of moveables, however, it was but rare that a possessor got any benefit from his innocence. If the thing had been stolen, it could not be acquired by prescription by any length of time. The taint thus attaching to stolen goods could not be removed until they got back to the possession of the owner. A similar taint attached to land or houses from which the owners had been driven by violence. Even a *bona fide* possessor in that case did not acquire by prescription.

Positive
and Negative
Prescription.

The rules just stated illustrate the nature of positive prescription as distinct from statutes of

limitation or negative prescription. In the case of positive prescription, the conditions of ownership depend upon the mental state of the possessor, limited by the stringent rule that stolen goods and lands seized by force are incapable of being so acquired. The dominating purpose of the old *usucapio* was in fact merely to cure informalities in the mode of acquisition. Negative prescription means that the true owner is debarred of his legal remedy if he neglects to seek the aid of the tribunals for a given time. Here the law contemplates distinctly divesting the true owner of his rights, but without giving the possessor any positive title. It was unimportant what was the state of mind of the possessor, or whether there was any taint in the article. At first, Roman Law had no statute of limitation, but in the time of Justinian the period for actions generally was thirty years.

Another important mode of acquiring ownership was *occupatio*, or the taking possession of a thing belonging to nobody (*res nullius*), but capable, nevertheless, of being held in ownership. In the eyes of the Romans, all untamed living creatures, whether their habitat is the air, the land, or the sea, were *res nullius*, and became the property of the person by whom they were captured. Rome had no game laws. A man might be forbidden to

Game.
Laws.

go upon another's land to hunt or snare birds ; but if he went and actually caught any bird or beast, they became his property. A bird or beast that was wounded belonged to him that actually took it, and not to him that struck the blow. If a wild creature after being caught escaped either out of sight or practically out of reach, it was again considered *res nullius*, and open to the first captor.

Tame Animals. Domesticated and tamed animals were not *res nullius*, and any appropriation of them without the will of their owner was theft. Pigeons and peacocks and birds might go beyond the reach of their owner, but yet return. So long as they did not lose the habit of returning, they were considered as domesticated animals. When bees hived, the young swarm belonged to the owner of the bees so long as he kept them in view and could follow them up ; otherwise they became the property of the first person that hived them. Precious stones found in a state of nature also became the property of the first taker. Treasure-trove, that is treasure left in the earth by persons unknown for a long time, belonged half to the finder and half to the owner of the ground. Lastly, the property of an enemy was *res nullius*. To this barbarous doctrine the Roman Law recognised no limitation. Lands, houses, moveables, wife and children—the enemy himself if alive—all became the spoil of the captor.

The last mode of acquisition is Accession. Accession. Accession is of four kinds :—(1) of land to land ; (2) of moveables to land ; (3) of moveables to moveables ; and (4) the addition of labour to moveables. The first case of accession of land to land arose from the action of streams and rivers in altering the distribution of land. In its higher reaches a river impetuously denudes patches of land, which, as its velocity diminishes, it gradually deposits. The slow increase of land near the mouth of a river, so gradual as to be at each moment imperceptible, was called *alluvio*, and the increase belonged Alluvio. to the owner of the lands enriched by the accretion. If the deposit takes place in the bed of the river, gradually an island is formed. The ownership of such an island was determined by its position in the stream. If it lay wholly to one side of Islands formed in Rivers. a line drawn longitudinally through the middle of the stream, it belonged to the owner of the land on that side of the river ; or it was divided among them if there were more than one such owner according to the extent of their lands, measured by straight lines drawn across the river from their respective boundaries. If the island lay in mid-stream, or partly on one side, and partly on the other, of a line drawn down the middle of the stream, then it belonged to the owners on both banks, and that line became the boundary between

them. If an island were formed by a river changing its course, forking into two branches and uniting lower down, the ownership of the land so surrounded was not changed. If a river permanently alters its course, leaving its old bed dry, that bed belongs to the landowners on both banks of the river, divided in the way already stated when an island arises in mid-stream.

Old Beds
of Rivers.

Fixtures. Moveables accede to land when one man sows, plants, or builds on another's land. The maxim of the Roman Law was that every thing fixed into the land upon its surface became the property of the owner of the soil. The owner of the principal was the owner of the accessory. In its primary aspect, the notion of a principal and accessory is arbitrary, although not illogical. Dress exists for men, not men for dress; dress is an accessory, because it exists for the sake of men. The ground upon which a pillar rests is the principal, because it can exist without the pillar, but the pillar cannot exist without the ground. This arbitrary idea was used to determine a difficult technical question. When land was built upon, and the land did not belong to the person who built, a conflicting claim of ownership arose. It would have been impossible to consider the landowner and the house-owner jointly owners, for who was to determine their respective shares? Hence

in all cases where the materials of different persons got so intermixed that it was inexpedient to separate them, the question of ownership was determined by the rule that the owner of the principal should have the accessory. At first the Roman Law was content to let the question rest there : whatever was built on the land belonged to the owner of the land ; but a question of equity remained behind. Suppose the owner of the land built with material belonging to another. Then the XII Tables provided that the landowner should, in that case, pay double the worth of the material to the owner of the material. Suppose the owner of the material built on land not belonging to him. He either knew that, or he did not. If he knew it, he acted with his eyes open, and lost his property ; but if he thought he was building on his own land, the Praetor ultimately protected him from ejection, unless the owner offered compensation. If, however, he accidentally lost possession, and the owner recovered the land without the necessity of a lawsuit, he had no remedy. To this rule the Roman Law admitted one just and politic exception. A tenant of a house could remove the fixtures that he had placed for his use, provided he did no damage to the house. A tenant of land was entitled to compensation for unexhausted improvements, except such as he

Compensation.

Unexhausted Improvements.

had specially agreed to execute in consideration of a lower rent. The amount was fixed with regard to the increased value of the land.

The idea of accession was employed in the case of addition of moveables to moveables ; such, for example, as writing a book, or putting gold letters on paper ; but in the case of pictures, it was thought too strong to say that the ownership of the canvas or wood should determine the ownership of the painting. In this case the logical idea succumbed to the test of value. The rules as to compensation came in as in the former case to redress the balance of unfairness.

Books. The working up of raw materials into a new form received the name of *specificatio*; but it is in fact only a special instance of accession. Here the question at once arose whether the labour or the material was principal. Manifestly the logical idea was of little use, and, after much controversy, the rule was finally settled as follows:—
Pictures. If any part of the material employed belonged to the workman, the workman was the owner of all ; if not, the question was whether the article could be resolved into its raw material. If it could, the owner of the materials was held to be the owner of the whole ; if not, the workman was the owner. Thus a vessel of gold, silver, or other metal would be the property of the owner of the metal how-

**Manu-
factured
Articles.**

ever exquisite and valuable the workmanship ; but a person who had made wine out of another's grapes, or flour out of another's wheat, was the owner of the product, because it could not be resolved into its original material. Those rules applied, however, only when there was something of workmanship ; if metals, such as gold or silver, were merely fused into one lump, or wheat belonging to two persons was mixed together, or mead from one man's wine and another's honey, in all such cases the owners of the several parts were held to be joint-owners of the whole, and no accession took place. Cases of this sort were called *commixtio* or *confusio*.

The institution of private property did not extend to all the material objects of the universe. The atmosphere, for example, or the ocean, is not susceptible of the exclusive possession that lies at the foundation of proprietary rights. Other things might be partially appropriated, and rights falling short of ownership might be exercised. The whole of this branch of the law was created by the Praetors, and such rights as they recognised were protected by Interdicts.

Res communes were things whereof no one was owner, and that all men might use. Such were the air, running water, the sea, and the sea-shore. The sea-shore extended to the highest point

reached by the waves in winter storms. The right of fishing in the sea belonged to all men. Any one could haul up his nets on the shore, or spread them out to dry, or build a hut for himself. So long as the structure existed it was private property ; but when it fell into ruins the soil again became common. Every one had the right to prevent any construction on the shore that would interfere with his access to the sea or the beach.

Res Publicae.

Fishing in Rivers.

Res Publicae were the property of the Roman people, whereof the use was free to all. The chief examples were public roads, harbours, and rivers, and the banks of rivers. In Rome itself the roads were specially under the jurisdiction of the Curule Aediles. Every river that flowed in summer and winter was public. The banks also, measured to the highest point of the winter flood, could be used by the public for the purpose of landing goods or making fast boats to the trees. The right of fishing, like the right of navigation, was free to all.

Res Universitatis were things belonging to a municipality or corporation, the use of which was free, such as race-courses and theatres.

Res sacrae.

Res divini juris consisted of three classes—*sacrae*, originally devoted to the gods above ; *religiosae*, to the gods, the shades. Under the Christian Empire, *sacrae* meant religious edifices ; and *res religiosae*, any ground consecrated for the reception of the

dead. *Res sanctae*, such as the walls of cities, were so called because a capital penalty was fixed for those that violated them.

SECT. II.—PERSONAL SERVITUDES.

Ownership, in the full sense of the term, consists of the most extensive rights to things—rights so numerous that they cannot be precisely limited—rights that endure for ever, and are the subjects of unrestricted alienation. If these rights are limited in duration,—as an estate for life in land—a class emerges, which is differently described in different systems of law. In England a life-interest is generally spoken of as limited ownership: in Rome, a life-interest was not regarded as a form of ownership, but as the antithesis of ownership, as a subtraction from the ownership or a burden upon it—in a word, a servitude. The same term is applied not only to the indefinite use of land—for example, involved in the Roman *ususfructus* or estate for life—but to the class of rights strictly definite, as rights of way, which in English Law are known as easements. According to the Roman jurists, usufruct, and other interests like it, are called personal servitudes (*servitutes personarum*), because given to an individual for his enjoyment, and dying with him; whereas praedial servitudes (*servitutes praediorum*) were given to persons only as owners of

Nature
of Servi-
tudes.

Estates
for Life.

adjoining land. The distinction is not sound. The true distinction is between indefinite rights, such as usufruct, and single or definite rights, such as a right to draw water, or a right to pour the rain-water from your house on to your neighbour's land. These definite rights to things, called by the jurists *praedial servitudes*, are not, in the nature of things, *praedial* : theoretically they need not be confined to owners of neighbouring land ; and in a few rare instances in the Roman Law were not so confined. The English Law has the correct distinction. Easements appendant are comparable to *praedial servitudes* ; but the same easements may be unconnected with the ownership of land—in which case they are said to be easements in gross.

In or-
poreal
Things.

This seems the proper place to notice another fallacious distinction introduced by the Roman writers, and followed by their English copyists. Some things, we are told, are corporeal, others incorporeal. Corporeal things can be touched, as a farm, a slave, gold, or wheat. Incorporeal things cannot be touched ; they consist of rights, as an inheritance, usufruct or obligation. This means that the right of inheritance or the right of usufruct is incorporeal. Corporeal things, we are told, can be possessed and delivered ; incorporeal things do not admit of possession or delivery. But with all this subtlety the jurists overlooked

the fact that they were making a distinction without a difference. The right of ownership, which was transferred by the delivery of the thing, is just as incorporeal as the right of usufruct. So arbitrary is the division that a life-interest in land is a corporeal thing in English Law, and a life-interest in land was incorporeal in the Roman Law. The meaning is simply that delivery was confined in Roman Law to the transfer of ownership, whereas in English Law the delivery of land might be for an estate for life, or in fee-simple, according to the intention of the parties. The true distinction is between the groups of rights transferred by delivery, and those transferred in other ways ; in the Roman Law the first group consisted of ownership only ; all other rights to things were transferred in a different manner. By a figure of speech, the rights transferred by delivery were said to constitute corporeal things.

A usufruct is the right of using and taking the fruits of anything. It was understood to be given ^{Quasi-}usufruct. for life, unless a shorter period was expressed. It may exist in land, houses, slaves, beasts, and in short everything except what is consumed by use. By a *senatus consultum*, however, it was determined that a legacy of things consumed by use, such as money, wine, oil, wheat, garments, by way of usufruct, should not be void. On the legatee's

giving security to return to the heirs of the testator on his death the articles so bequeathed, or their value in money, they were given to him. Such a legacy was merely a loan without interest. As it bore a certain analogy to usufruct, it was called quasi-usufruct.

Rights of
Fructu-
arius.

The usufructuary of land became owner of the crops as soon as they were gathered, but not before. Consequently if he died before that event, the crops belonged to the owner. Generally speaking, but with one exception, the rights of an English tenant for life of land are the same as the rights of the usufructuary. An English tenant may work mines or quarries that have been opened, but cannot open new mines or quarries. The usufructuary was free from this restriction. A usufructuary could not cut timber. Trees overthrown by wind or dead could be taken to repair the house, but not usually for fuel. The usufructuary could, however, take branches to stake his vines, and lop pollards (*silva caedua*).

Usufruct of
House.

The usufructuary of a house could use it, but must not alter the character of the building. He was not allowed even to put a roof on bare walls. He could not put up a new building, unless required for strictly agricultural purposes; and he could not pull down any building, even one he had himself put up. Thus we learn where Lord

Coke got his idea that if the life-tenant put up a house, it was waste, and if he pulled it down again, that was double waste.

In ancient times, usufruct was established by a surrender in court (*cessio in jure*), a fictitious suit, which may be compared with the obsolete Fines and Recoveries of English Law. But in the time of Justinian a usufruct was created either by legacy or by agreements and stipulations. The usufruct was extinguished if the usufruct and ownership vested in the same person (*consolidatio*); if the usufructuary neglected to exercise his right for the usual period of prescription; or if the thing perished, or its essential character was altered.

Use (*usus*) meant use without the fruit. One that had the use of a farm could have only such vegetables, fruits, flowers, etc., etc., as were required for his daily needs. He must not hinder the farm-work. He that had the use of a house could use it for himself and family; it was doubted if he could receive a guest, and he could not transfer his right to another. Use was established or extinguished in the same ways as usufruct.

Habitatio (the right of dwelling in a house) and *operæ servorum* (use of slaves' services) were distinguished from usufruct by technicalities that need not be noticed.

Precarium.

Precarium was holding land or a moveable at the will of the grantor. This tenure has a certain historical interest. The tenant, although his interest was so slight, had possessory rights protected by interdicts ('Roman Law,' pp. 218-220).

SECT. III.—PRAEDIAL SERVITUDES.

Nature of
a Praedial
Servitude.

A praedial servitude is a definite right of enjoyment of one man's land by the owner of adjoining land. The land in favour of which the right is created is called the *praedium dominans*, that over which it is created is called *praedium serviens*. Servitudes were for the land, in this sense, that the necessities of the dominant land constituted the measure of the enjoyment allowed. A right to lead water to a farm was restricted to the amount of water necessary for the use of that farm. So if the right was to take sand or lime from adjoining land, then no more could be taken than was wanted for the farm to which the right was attached.

General
Maxim.

From the nature of servitude, it followed that an owner could not have a servitude over his own land (*nulli res sua servit*). An owner who, as such, is entitled to every possible use of his land, has no need of a right to one particular mode of enjoyment.

Servitudes
are Negative or Affirmative.

Again, the nature of the duty imposed by a servitude on the owner of the servient land is purely

negative. Except in the case where a man's walls or pillars were used to support another's building, where by special agreement the duty to repair could be cast upon the owner of the walls or pillars, a positive duty could not be imposed. (*Servitutum non ea natura est, ut aliquid faciat quis, sed ut aliquid patiatur, aut non faciat.*) When the duty laid upon the owner of the servient land was merely not to do something, as not to shut out his neighbour's light, the servitude was said to be *negative*; if it consisted in forbearance, in permitting another to do what but for the servitude he would not be entitled to do, as, to allow another to walk across one's land, the servitude was said to be *affirmative*.

Servitudes were subject to certain other rules of a technical character. Thus, it was said that all servitudes ought to be capable of enduring as long as the land to which they were attached. But exceptions were allowed, and a right of water even from an artificial reservoir might be granted. Again, it was said that a servitude was indivisible. Thus, if the owner of land dies, leaving several houses, each heir is entitled to the enjoyment of the servitudes. But perhaps the most technical rule of all was that there could not be a servitude of a servitude. Thus, if Titus has a right of leading water over neighbouring farms, these neigh-

Servitudes
perpetual.

Servitudes
indivisible.

Servitus
servitutis.

bours cannot have a servitude of drawing water from the aqueduct. But notwithstanding the rule, an agreement to permit them to draw water bound Titus, although it was not a servitude.

Division
of Servi-
tudes.

Prædial servitudes were of two kinds, RURAL (*jus rusticorum prædiorum*), and URBAN (*jus urbanorum prædiorum*). Rural servitudes affect chiefly or only the soil, and could exist if no houses were built; urban servitudes affect chiefly or only houses, and could not exist without houses. That is the correct distinction; for a right-of-way, which is a rural servitude, may exist in a town; and a right to rest a beam or joist on a neighbour's wall, which is an urban servitude, may exist in the country. In ancient times rural servitudes in Italy were *res mancipi*, and could be conveyed only by *mancipatio* or *cessio in jure*; urban servitudes were *res nec mancipi*.

Rights of
Way.

Among rural servitudes, the most usual were—(1) Rights of way; *iter*, a right for a man to walk but not to drive a beast or a carriage; *actus*, the right to walk and drive a beast or a carriage; *via*, more extensive, including the right to draw stones and wood and heavy laden waggons. (2)

Rights of
Water.

Rights of water included the leading of water through another's land (*aquaeductus*). Usually the water must be conveyed in pipes, although, if so arranged, stone channels might be used. In the

absence of agreement, the quantity of water to be taken was fixed by custom ; but unless by special agreement or by custom the water could not be used for irrigation. *Aquaehaustus* is the right of drawing water from a well or fountain on another man's land. The right of taking cattle to water on another's land was called *pecoris ad aquam appulsus*. Again, one might have the right to put cattle to pasture on the land of another, or to quarry for stones, or to dig for sand or chalk, or to cut stakes for vines, and many similar rights.

Other
Rights.

The principal urban servitudes included support to another's building (*oneris ferendi*); inserting beams (*tigni immittendi*) in the wall of another's house for security, or for covering to a walk along the wall; the right to refuse, or the obligation to receive, the droppings of water from the tiles of a house (*stillicidium*), or the rain water from a gutter (*flumen*); the right against a neighbour to prevent an increase to the height of his house (*altius non tollendi*); the right to prohibit any construction that would shut out light from a house or the general view (*ne luminibus officiatur, et ne prospectui offendatur*); the right of passing a sewer through another's ground.

Urban Ser-
vitudes.

A servitude involving a burden upon the owner-ship of land could of course be created only by owners. An owner could burden his land with a

Creation
of Servi-
tudes.

Extinction
of Servi-
tudes.

servitude by agreement and stipulation ; and such an agreement would be implied if the owner of the dominant land had enjoyed a servitude for the full period of prescription applicable to land. Again, by will an owner could impose the burden of a servitude upon any person to whom he bequeathed the land. Once established, a servitude continued until it was surrendered by agreement, or merged, when the person to whom a servitude was due became owner of the land upon which the servitude was imposed. In this case, even if the lands were afterwards separated, the servitude was not restored, except by special agreement. If a person entitled to an affirmative servitude did not exercise his right for the period of prescription, he lost it ; so, if the person entitled to a negative servitude allowed that period to elapse after the owner of the servient land had violated the servitude, as, for example, by shutting out his lights, without making any complaint, he in like manner lost his right also.

SECT. IV.—EMPHYTEUSIS.

Perpetual
Leases.

Emphyteusis is a grant of land for ever, or for a long period, on the condition that an annual rent (*canon*) shall be paid to the grantor and his successors, and that, if the rent be not paid, the grant shall be forfeited. This tenure may be

traced to the long or perpetual leases granted by the Roman State of lands taken in war. The rent given for such land was called *vectigal*, and the land itself *ager vectigalis*. The advantages of this perpetual lease were appreciated by corporations, ecclesiastical and municipal. A tenure that relieved the owners from all concern in the management of their lands and gave them in exchange a perpetual right to rent, seems to be specially beneficial for corporate bodies. The same tenure was adopted by private individuals, under the name of Emphyteusis. In the time of Gaius a controversy was maintained as to whether Emphyteusis was a sale or letting to hire of land. It resembled sale, inasmuch as it gave a right for ever to the land, but it differed from sale in respect of the price being an annual payment instead of a sum down. It resembled hire in respect of the rent; it differed from hire in respect of the perpetual interest of the tenant. The Emperor Zeno ^{Law of Zeno.} terminated the discussion, by declaring that the incidents of Emphyteusis should be governed by the agreement of the parties, and in the absence of such agreement, that the total destruction of the land or houses should terminate the tenure, but that for a partial loss the tenant should have no claim to an abatement of the rent.

Rights of
Emphy-
teuta.

The rights of the tenant (*Emphyteuta*) were almost unrestricted, except that he must not destroy the property so as to impair the security for the rent. The tenant paid all the taxes, and he could be ejected from the land if for three years he failed to pay his rent or produce the receipts for the public burdens. The tenant could sell his right, but was bound to give notice to the owner of the sum offered to him, and the owner had the option of buying it at that amount. If the owner did not exercise his right of pre-emption, the tenant could sell to any fit and proper person without the consent of the owner. The owner was bound to admit the buyer into possession, and was entitled to a fine (*laudemium*) not exceeding two per cent. of the purchase money for his trouble.

SECTION V.—MORTGAGE.

Contractus
Fiduciae.

The earliest mortgage of the Roman Law was an actual conveyance by *mancipatio*, executed by the borrower to the lender, upon an agreement (*contractus fiduciae*) that if the purchase-money were repaid by a day named, the lender would reconvey the property to the borrower. If by the day named the borrower had not paid off the loan, his property was entirely gone. But that was not the worst. The borrower might be willing to repay the money,

but in the meantime the lender might have sold the property, and the borrower could not follow it in the hands of the purchaser. This grave defect of the law it was sought to remedy by declaring the lender, under these circumstances, to be infamous. Clamant as these evils were, it required even a sharper sting of injustice to goad the praetor into action. It would seem that where the conveyance was not made by *mancipatio*, even the solemn promise to return the property on repayment of the loan had no legal effect ; and the lender could keep the property although its value might greatly exceed the loan, and refuse to accept repayment. At this point the praetor interfered, and issued an edict to the effect that where a lender got possession of his debtor's property, he should be compelled to give it up on the debtor *Pignus*. making a tender of the loan. To the borrower he gave for this purpose an *actio pigneratitia*, and such an informal pledge was known as *pignus*. The object of the praetor was merely to redress a flagrant wrong and prevent an unjust creditor taking advantage of a mere absence of formality to rob his debtor of his property ; but the result of his intervention was practically to endow the Roman law with a simpler and more convenient form of mortgage. The mere delivery of a thing was enough to give the creditor full security, while

at the same time the ownership remained with the debtor, and thus the creditor was disabled from fraudulently conveying the property. The creditor, not being owner, could not give a buyer the ownership that he himself did not possess.

Hypotheca. But the *pignus*, although a great improvement, fell short of the requirements of a satisfactory form of mortgage. The creditor did not obtain any security, unless the possession of the property was given to him. Thus, in order to obtain a loan, an owner was subject to the great inconvenience of parting with the possession of his property. In some cases, where a security was desiderated, this condition could not be complied with. Thus when a landlord let a vineyard to a tenant for the usual period of five or seven years, he naturally desired to have a special claim on the stock and implements of the farmer as a security for his rent. But as it was essential these things should remain in the possession of the farmer, the landlord was disabled from enjoying the security of a *pignus*. Some time before Cicero, a praetor of the name of Servius introduced an action by which he gave the landlord of a farm a right to take possession of the stock of his tenant for rent due, when the tenant had agreed that the stock should be a security for the rent. The name given to such a security—

*Actio
Serviana.*

hypotheca—points to the Greek origin of this contrivance. It was not long, however, before the advantages of such a security were appreciated in other cases, and at length the action introduced by Servius, under the name of *quasi-Serviana*, was allowed in all cases where an owner retained possession, but agreed that his property should be a security for a debt. Thus in the result, a mere agreement, which need not even be in writing, and without any transfer of possession to the mortgagee, enabled an owner to borrow money and give ample security to the creditor without subjecting himself to any inconvenience. Practically in the later Roman law no distinction was made between *pignus* and *hypotheca*.

If the mortgagee was not in possession, he could sue for the property in the hands of any person possessing it. He could then exercise the power of sale, which in the Roman law was an inherent right of the mortgagee. If the parties had agreed as to the manner, time, etc., of the sale, their agreement was to be observed ; if not, the creditor must give formal notice of his intention to sell to the debtor ; and thereafter two years must elapse before the sale could be made. If the creditor sold, he must give the surplus, after paying himself, to the debtor. Justinian allowed foreclosure only when the creditor was unable to find a

Power
of Sale.

Fore-
closure.

buyer at an adequate price. But the debtor must have due notice, and if within a specified time he did not pay, the creditor obtained the ownership on petition to the emperor. Even then a debtor was allowed two years' grace; but if he did not pay all principal and interest within that time, his claim was absolutely foreclosed.

Priority.

If the same thing were mortgaged to several persons, and the property was not sufficient to pay them all, the question of preference or priority arose. Except in the case of a small number of privileged mortgages, the question of priority was determined by two principal rules. First, a mortgage made by a public deed, that is a deed prepared by a notary (*tabellio*), and sealed in the presence of witnesses, or even by a private writing signed by three witnesses, was preferred to an earlier mortgage not executed with these solemnities. Secondly, unwritten mortgages, or written but unattested by witnesses, took effect according to priority of time. When the same thing was hypothecated at different times to different persons, he that has the first hypothec excludes all others; in like manner, the second excludes the third, and the third the fourth. But at what moment does a hypothec take effect? When possession is obtained, or if the debt is future or conditional, when the sum becomes due? These times were immaterial;

priority was determined by the date when the agreement of mortgage was made.

Usually no hypothec existed except by agree-
ment ; but in some cases the law set up an implied ^{Implied} mort-
gages. Thus at Rome the landlord of a dwell-
ing-house had an hypothec, in the absence of
express agreement, over the furniture (*invecta et*
illata, i.e., whatever was brought for personal use
by the tenant) in the house hired from him, as
security for the rent, and for other claims he might
have under the tenancy. Justinian extended this
law to the provinces. In the case of farms the
landlord had an implied hypothec over the crops
from the moment they were gathered ; but he had
no hypothec over the agricultural implements,
cattle, or slaves, or household furniture, except by
special agreement.

CHAPTER IV.

THE LAW OF OBLIGATIONS.

SECT. I.—GENERAL PRINCIPLES OF THE LAW OF CONTRACT.

Convey-
ance dis-
tinguished
from Con-
tract.

TO determine the true place of contract in a proper classification of law, it is necessary to apprehend, in the first instance, the difference between Conveyance and Contract. Conveyance is the transfer of ownership or of rights partaking of the nature of ownership (rights *in rem*); contract creates obligations or rights *in personam*. A right *in rem* is a right availing against all men generally, and is a right to forbearances; a right *in personam* is a right availing against a specified individual or specified individuals, and is a right either to acts or to forbearances. The right of a master over his slave is a right *in rem*; it is a right against all men that they shall forbear from depriving the master of the possession or services of his slave. The right of a patron to maintenance from his freedman is a right *in personam*; it is a right against the freedman alone, and it is a right to an

act or service. Ownership, again, is an aggregate of rights *in rem*. An owner has a right as against all men generally that they shall not deprive him of the possession or use of the thing belonging to him. Contract is the antithesis of ownership. It creates duties binding the promisor or promisors, and no other persons, and those duties are generally to render services, and not merely to exercise forbearances. 'The essence of an *obligatio*,' says the jurist Paul, 'does not consist in this, that it makes a thing ours, or a servitude ours (*jus in rem*), but that it binds another to give something to us or do something for us (*jus in personam*).'

Right and duty are correlative terms. A. cannot have a right unless B. or C. owes a duty to him. Partly from the circumstance that *jus* rarely meant 'a right,' and that no other Latin term conveniently renders that idea, and partly from the fact that the forms of actions were framed upon an allegation of duty, the Roman jurists did not speak of rights *in personam*, but of the correlative *obligatio*. An obligation was defined to be the legal bond that ties us down to do something according to law. (*Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura.*)

Rights *in personam* (and consequently *obligationes*) fall into two classes. Either they arise

Rights *in rem* and *in personam*.

Right and Duty Correlative.

Contract and Quasi-Contract.

from the consent of the parties, or they are created by law, irrespective of the consent of the parties. The first are contracts, the second, quasi-contracts. The duties of a tutor to a pupil do not arise from any contract between the tutor and pupil, but they belong to the category of '*obligatio*;' and are not infelicitously said to arise *quasi ex contractu*. By the Roman jurists, Delicts, delicts also are placed as a species of '*obligatio*' alongside contract and quasi-contract. It is true that a person committing a delict is under an obligation to compensate the injured party; and thus if we look merely to superficial logical characteristics, a delict may be classed with obligations. But the true nature of delict, as I have elsewhere shown ('Roman Law,' p. xxxvi), is very different; a delict is a violation of a right *in rem*, and ought, having regard to consistency, to be considered under its proper head of rights *in rem*.

Proposal
and Ac-
ceptance.

A contract, then, arises from the agreement of the parties; but what is 'an agreement?' An agreement involves two elements, a proposal and an acceptance. A person makes a proposal when he signifies to another his willingness to do or not to do something, with a view to obtaining the assent of that other to such act or abstinence. The proposal is said to be accepted when the person to whom the proposal is made signifies his

assent thereto.* In the chief contract of the Roman Law, the *stipulatio*, the proposal was made not by the promisor but by the promisee. 'Will you give me 100 *aurei*?' 'I will.' Here the question is put by the creditor, and the debtor accepts the proposal by his answer. In order to make a valid agreement, it is necessary that the answer should agree with the terms of the question, in other words, that the proposal made should be accepted, and not something else. Thus, if the proposal is unconditional and the acceptance conditional, or *vice versa*, there is no agreement. So if the proposal is for something to be done on a future day, and the acceptance is for a different day, there is no agreement. So again, if the stipulator asks, 'Will you give me

* Such an agreement is a '*conventio*.'

Contractus is a *conventio* to which the law attaches a *juris vinculum*.

Pactum or *pactio* is an agreement not clothed with an action, but available by way of defence to an action. In later times certain pacts (*pacta legitima*, *pacta praetoria*) were enforced by action, and nevertheless did not obtain the name of *contractus*.

Pollicitatio is a proposal not meant to be accepted; as, for example, a vow.

Civilis obligatio is based on statute or custom.

Honoraria obligatio is established by the Praetor in the exercise of his jurisdiction.

Naturalis obligatio cannot be enforced by action, but may be used by way of defence or set-off, and will support a mortgage or suretyship.

Stichus or Pamphilus?’ and the answer is, ‘I will give Stichus,’ there is no agreement, because the proposal is disjunctive and the acceptance is not.

The points common to all contracts may be considered under the following heads :—

- I. Consent—Error.
- II. Time, Place, Condition.
- III. Force, Fraud, and Bad Consideration.
- IV. Illegal Promises.
- V. Incapacity to Contract.
- VI. Agency.

Essential Error. I. CONSENT—ERROR.—The parties to a contract are said to consent when they agree upon the same thing in the same sense. Their intentions can be expressed only through the medium of language. This medium is a source of error. Error is essential (*error in corpore*) when it is such as prevents any agreement being made ; it is non-essential (*error in materia* or *substantia*) when it does not prevent an agreement arising, but may give a right to one of the parties to withdraw from the contract. Essential error is such as prevents the contracting parties from agreeing upon the same thing in the same sense. This may occur in three ways :—(1) I may intend to sell you one slave, you to buy another—as, if I sold Stichus, and you intended to buy Pamphilus, whom you

misnamed Stichus. If both had meant the same thing, although they knew it by different names, the contract would have been good. (2) I intend to let you a farm ; you think you are buying it. Here again, as the understanding affects the nature of the rights created, the error is fatal, and there is no contract. (3) I intend to lend money to Cornelius ; Julius falsely representing himself to be Cornelius, gets the money. Here again there is no contract of loan, as I did not intend to bind myself to Julius ; and Julius may be proceeded against for theft.

In all other cases error was non-essential, and the general rule was that non-essential error did not vitiate the contract. The subject is not free from difficulty. Savigny, who has examined the cases very minutely, arrives at the conclusion that in sale, even non-essential error vitiated the contract, where the difference between the thing bought and that which the purchaser intended to buy was such as to put the one into a different category of merchandise from the other. Thus, if I buy a ring, thinking it to be gold when it is copper, or silver when it is lead, the contract is void. Again, if I buy wine, and what is sold is vinegar, or I buy a female slave, and a male slave is sold, or *vice versa*, the contract is void.

Time. **II. TIME.**—When an agreement was made to pay money or do anything on a particular day, performance could not be demanded before that day ; and not even on that day, because the whole of the day ought to be allowed the debtor for payment at his discretion. So if the payment is to be made in a given year or month, the whole of the year or month must elapse before an action can be brought. If the contract is to be performed within a limited time—say, to build a house in two years—the question arose whether an action could be brought before the whole period had expired, if so much time had elapsed that it was impossible the works could be constructed within the time. Upon this question the Roman jurists were hopelessly divided, but the preponderance of authority seems to favour the view that in such a case the whole time must elapse before an action could be safely brought for breach of contract. If no time was named in the agreement, money promised became due at once ; and other promises must be performed within a reasonable time.

**Place of
Perform-
ance.**

PLACE.—If a promise is made to pay at Ephesus, the debtor could not be sued in Rome, without allowing for any advantage he might have in paying at Ephesus. Generally speaking, if a debtor promised to pay or do something at a particular place, the creditor could not demand

performance elsewhere ; but the Praetor had a discretion to allow the creditor to do so, taking care that the debtor was not put to a disadvantage. If nothing was said in the contract as to the place of performance, frequently that was determined by the nature of the promise. A promise to deliver a farm must be performed at the farm ; a promise to repair a house must be performed where the house is. When that indication was wanting, the general rule was that the creditor could demand performance in the place where he could sue—that is, within the jurisdiction to which the defendant was subject. This rule was subject to a certain qualification. A defendant was not obliged to carry a moveable from the place where it happened to be at the time fixed for delivery, except at the risk and cost of the plaintiff, unless he had purposely caused the moveable to be kept in an inconvenient place.

CONDITION.—A condition exists when the performance of a promise is made to depend upon an event *future* and *uncertain*. If the event is past or present, the obligation is not suspended at all, but either at once takes effect, or is wholly nugatory. If a stipulation is made, ‘Do you undertake to give it if Titius was consul, or if Maevius is alive?’ and neither of these is so, the stipulation is not valid ; but if they are so, it is

Condition
defined.

valid at once. But when an obligation depends on an event future and uncertain, it remains to be seen whether the event does or does not happen before the obligation can arise. The event must be uncertain as well as future. A promise to pay money on the death of Titius is a promise that one day will certainly have to be performed, but the day itself is uncertain. Consequently, such a promise was construed as a certain promise to pay, as an existing obligation, only the time for performance being uncertain. The jurists called this *incertus dies*, as distinguished from *conditio*.*

Conditions
in Con-
tracts and
Wills.

In the Roman Law a somewhat arbitrary line was drawn between conditions in contracts and

* Certain terms continually recur in the Roman Law which it is expedient that students should know. A notable distinction was drawn between the inception of the obligation and the time for performance. When an obligation begins to exist, it was said, *dies cedit*; when performance may be demanded, it was said *dies venit*. If I agree to give a sum to Maevius, at one and the same moment the debt exists (*dies cedit*), and payment may be demanded (*dies venit*). If I agree to pay Maevius a sum of money a year hence, then at once the debt exists (*dies cedit*), but payment cannot be demanded before the end of the year (*dies non venit*). If I agree to pay a sum to Maevius if the ship 'Flora' arrives from Carthage, then until that event happens there is no obligation (*dies non cedit*); but when the event happens, at once the obligation exists, and performance may be demanded (both *dies cedit* and *dies venit*).

conditions in legacies or wills. Although in a conditional contract the obligation did not exist until the condition was fulfilled, yet, even if the creditor died before the event, his heir got the benefit of the contract if the event afterwards occurred. A conditional promise gave rise to a hope only that there would be a debt, and that hope was transmitted by the creditor to his heir if he died before the event happened. But if a legacy or inheritance were given conditionally, and the legatee or heir died before the event happened, he transmitted nothing to his heir. Again, if the event upon which a promise was made to depend was one that could not or ought not to occur (*i.e.*, was impossible or illegal), then the contract was held to be altogether null and void. But in the case of a will, if a legacy or an inheritance were left subject to an illegal or impossible condition, the legacy or inheritance was held to be validly given, and the condition was simply wholly disregarded. 'If I touch the sky with my finger,' is a condition physically impossible; 'If you kill Titius, I will give you 100 *aurei*,' is a condition illegal.

Illegal
Condi-
tions.

III. FORCE, FRAUD, AND BAD CONSIDERATION.—A promise extorted by fear was not binding. Force (*vis*) is when a promise is made in *vis*.

consequence of the actual exercise of superior force. Intimidation (*metus*) is a threat of such present immediate evil as would shake the constancy of a man of ordinary firmness. Whether the force or intimidation was applied by the party benefiting by the promise, or by a third party, the contract was equally void. The effect of fraud (*dolus*) was somewhat different. If the fraud was perpetrated by one not a party to the contract, the contract was valid, and the remedy of the debtor was by an action for fraud against the person deceiving him. Fraud is a term scarcely admitting precise definition. It may be described and illustrated, but hardly defined. In the widest sense, fraud (*dolus*) means every act or default that is against good conscience. It occurs chiefly in two forms, either the representation as a fact of something that the person making the representation does not believe to be a fact (*suggestio falsi*), or the intentional concealment of a fact by one having knowledge or belief of the fact (*suppressio veri*).

Illustrations.

Titius sells a female slave to Gaius, holding out that she had borne children, when she had not. Titius must submit to a reduction of the price, or to have the slave returned.

Maevius sells a house in Rome without informing the buyer that it was liable to a rate for the support of an aqueduct. Maevius must submit to a reduction of the price.

Gaius sells his slave Stichus, on account of his habit of stealing, and does not inform the buyer of the character of Stichus. Gaius must pay the loss caused by the slave's thefts.

Julius, in treaty for the purchase of a farm, went out with the owner to see it. After the visit, and before the treaty was concluded, a number of trees were blown down by the wind. Julius cannot claim the trees as buyer, because they were severed from the land before the date of the contract; but if the owner knew, and Julius did not, that the trees had been blown down, the owner must pay the value of the trees.

A vendor knowing that the land is burdened with a servitude, says nothing about it, but makes a clause in the agreement that he will not be answerable for any servitude to which it may turn out that the land is subject. He may nevertheless be sued for the *suppressio veri*.

Titius sells an ox to Gaius. The ox suffers from a contagious disorder that affects and destroys all the cattle of Gaius. If Titius knew that the ox was diseased, he must pay the value of all the cattle of Gaius; if he did not know, then the price of the ox is to be reduced to the sum Gaius would have given for it if he had known it was diseased.

Although the Roman Law did not generalise the doctrine of valuable consideration, which lies at the root of the English law of contract, yet if a promise were made for an illegal consideration (*injusta* or *turpis causa*) it could not be enforced. Again, where a promise was made for an intended consideration, and the consideration failed, there was no obligation. Thus if I gave a written promise to pay 100 *aurei* at the end of six months, in consideration of a sum intended to be lent to me, and no money ever was lent, the promise

Bad Consideration.

could not be enforced. The agreement was said to be *sine causa*.

IV. IMPOSSIBLE AND ILLEGAL PROMISES.—

Impossibilium nulla obligatio est. A person may undertake to do what he cannot perform. That is not impossibility within the meaning of the maxim. A thing is impossible, within the meaning of the maxim, when it is something that no human being can do. If I sell a man, whom I suppose to be my slave, but who is really free, the contract is one that cannot be carried out. Again, if I agree to buy what is really, without my knowledge, my own, the contract is manifestly nugatory. Equally so a contract dealing with something as private property, which is not capable of being so dealt with, as a church, or grave, or theatre, or forum belonging to the public is void. Such contracts are invalid, even if afterwards the things dealt with become private property and capable of being bought and sold. A sale of a freeman as a slave is not made valid even if the freeman should afterwards be reduced to slavery. But in such agreements an important distinction is to be observed. The impossibility of performing the contract may be known to both parties to the contract, or only to one of them. If a person, knowing that he could not perform his

Legal
Impossi-
bility.

promise, sold a public thing or a freeman to a buyer ignorant of the impossibility, an action for breach of contract, on the ground of deceit, could be successfully maintained against the vendor. The measure of damages was the loss sustained in consequence of the false representation.

Again, a contract was void if it contravened ^{Illegality} some statute, or public morality or public policy. A contract to steal, or to commit sacrilege, or to hurt or injure anyone, was void. In the Digest many instances exhibiting the Roman notions of public policy will be found. One alone may be given as an example—the *pactum de quota litis*. This meant an agreement whereby a person undertook to conduct a lawsuit for another, receiving a definite share of the proceeds. This was void, but an agreement to support litigation by a loan for interest was valid.

V. INCAPACITY. — The presumption that an ^{Infants,} agreement freely entered into is for the benefit ^{Minors,} of the parties entirely fails when one of the parties ^{Madmen.} is, by reason of disease or immaturity of mind, incapable of properly judging his own interests. A madman, accordingly, could not bind himself, except during a lucid interval. The case of infants and minors has been already considered (pp. 38, 41).

But, in addition to these grounds of incapacity, ^{Slaves,} which occur in all systems of law, the domestic

institutions of the Romans were the cause of special disabilities. Thus slaves, who had no *locus standi* in a Roman court, and who had no property, could not make contracts for themselves. An agreement made by a slave, so far as regards himself, could not have any higher validity than a mere *naturalis obligatio*, upon which he could neither sue nor be sued. But that broad rule of law requires qualification. To the extent to which a slave, by the indulgence of his master, could have property, to the same extent he had a capacity to contract, and to bind that property in the hands of his master. To the extent of his *peculium* a slave could bind himself where a freeman could do so, and his master was liable to an action (*actio de peculio*) to enforce payment. The master had a right first to deduct all claims he had against his slave, unless indeed the *peculium* was employed by the slave, with the knowledge of his master, in trade. In this case the master ranked merely as a creditor along with the other creditors of the slave (*actio tributoria*). The master, again, was not liable if the slave, without valuable consideration, undertook to answer for the debt of another.

*Filii-
familias.*

Persons under the power of a *paterfamilias* were subject to similar, but not identical, disabilities. So far as they had separate property, they could bind themselves by contract; but if they had no

such property, the rule was that they could be sued personally upon their contracts; but they could not sue their debtors, inasmuch as the benefit, although not the burden, of their contracts accrued to their *paterfamilias*.

VI. AGENCY.—An all-pervading, all-important conception of modern law is Agency or Representation, by which the power of creating legal obligations can be almost indefinitely multiplied. The early Roman Law admitted agency in not a single department, neither in lawsuits, nor in the conveyance of property, nor in the making of contracts. The actual person who intervened in a legal act could benefit by it, and no other. This is to be connected with the strict Formalism of the old law. Every legal act involved elaborate ceremonies, and possessed in the eyes of the Romans a species of sacramental efficacy. It appears to have been absolutely inconceivable to them that the benefit of these forms could be given to a person that had not recited the solemn words, nor partaken in their ceremonies.

A perfect type of agency implies three things: Perfect Agency.
 (1) that the authority of the agent is derived from the consent of the principal; (2) that the agent can neither sue nor be sued in respect of the contracts he makes on behalf of his principal; and

(3) that the principal alone can sue or be sued. Agency rests upon the authority given by the principal, and it is more or less imperfect, unless the agent is wholly irresponsible, and the principal alone can sue and be sued. The agent does his work most completely when, as soon as the transaction is complete, he drops out of view, and the principal and third party are brought face to face.

Acquisition by those *alieni juris*.

The old law, although it recognised no representation of one free man by another, possessed in the ancient constitution of the family no contemptible substitute. Slaves, sons, and others under the power of a *paterfamilias* could acquire for him, or rather they could acquire only for him and not for themselves. This was not agency—for the slave could acquire for the master not merely without his consent, but in opposition to his express command—but so far it served practically the same purpose as agency. The slave, however, could not subject his master to any burdens. ‘Our slaves can better our condition, but cannot make it worse.’ Thus the slave could act only in unilateral engagements: he could not buy or sell, or make any other contract involving reciprocal duties between the parties. This defect was, however, remedied by the Praetor, who gave an action (*actio quod jussu*) against the *paterfamilias* where, by his express

authority, the son or slave had made a contract with a third party. He even went further, and gave an action against the *paterfamilias* when, without express authority, the son or slave had made a contract for the benefit of the master's property (*actio de in rem verso*). This included all necessary or beneficial expenditure; such as cultivating the master's land, repairing his house, clothing slaves, or paying the master's debts. The ratification of the *paterfamilias* was not necessary; for the son or slave had, in virtue of the Praetorian action, an implied authority to make contracts for the benefit of his estate. The result, therefore, of the old principle of the civil law, eked out by the Praetor's actions, was, that sons or slaves under the power of a *paterfamilias* could act as agents for him, but not for any other person.

In two instances where the necessities of commerce made themselves felt, an approach was made to agency in the case of free persons as well as of slaves and others *in potestate*. (1) The owner or charterer of a vessel (*exercitor*) was bound by all contracts made by the captain of the ship relating to the ship, its seaworthiness and freight. The authority of the captain went to that extent, unless it were limited by his instructions. The captain was personally liable upon his contracts, as well as the owner, and

Slaves as
Agents.

Agency
of Ship
Captain.

in this respect did not enjoy the immunity of a true agent. Again, the owner could not sue the third parties directly; he had no direct remedy, except against his own agent; and thus his rights fell short of those of a true principal.

Shopmen
as Agents.

(2) A servant or manager of a shop or business (*institor*) could bind his principal by all contracts made in relation to the business. Here again, however, the servant or manager was himself liable personally for his contracts; and, as a general rule, the principal could not sue the debtors of his manager, but could only require his manager to transfer his rights of action. In extreme cases, however, where it was necessary to avoid loss, the principal could, by leave of the Praetor, sue third parties directly. In a few cases, not strictly falling within the description of the *institoria actio*, a principal was allowed to sue directly persons who had made contracts with his agents. But beyond that the Roman Law did not go in establishing a law of agency for contracts. Savigny, whose opinion carries deservedly great weight, is of a different opinion. He thinks that in the later law agency was universally admitted in non-formal contracts. The arguments that seem to me fatal to this view are discussed at length in 'Roman Law' (pp. 441, 442).

Savigny's
Views.

SECT. II.—CLASSIFICATION OF CONTRACTS.

Contracts are divided in the Institutes of Gaius and of Justinian into four classes, according to the manner in which they are made : (1) by acts (*re*) ; (2) by words (*verbis*) ; (3) by writing (*litteris*) ; and (4) by consent. This division is faulty ; it is not quite accurate, and it does not divide the classes according to their most important characters. To prevent mistakes, it will be convenient to place in parallel columns the contracts as arranged in the Institutes, and in the order here followed. Those enclosed in brackets were obsolete in the time of Justinian.

IN THE INSTITUTES.	REARRANGEMENT.
A. Contracts <i>re</i> .	A. Formal Contracts.
1. Mutuum.	1. [Nexum].
2. Commodatum.	2. Stipulatio.
3. Deposit.	3. [Expensilatio].
4. Pignus.	4. [Chirographa].
	5. [Sygraphae].
B. Contracts <i>verbis</i> .	B. Contracts based on Part
1. Stipulatio.	Performance.
C. Contracts <i>litteris</i> .	1. Mutuum.
1. [Expensilatio].	2. Commodatum.
2. [Chirographa].	3. Deposit.
3. [Sygraphae].	4. Mandate.
D. Contracts <i>consensu</i> .	C. Contracts for valuable con-
1. Sale.	sideration.
2. Hire.	1. Sale.
3. Partnership.	2. Hire.
4. Mandate.	3. Partnership.

English
and Ro-
man Prin-
ciples of
Contract.

The principles upon which this arrangement is made, and the historical relations of the several contracts, are considered at length elsewhere. ('Roman Law,' p. 353, *sq.*) For the English student, it is necessary to be on his guard against being misled by the Roman arrangement to overlook the analogies, more important than the differences, between the English and Roman Law. At the first blush, no two systems can appear more at variance. The English Law does not enforce gratuitous promises, or, in technical language, promises made without valuable consideration. The exception is the Formal contract of the English Law—the Deed, by which is meant a writing, sealed and delivered. Thus a contract, to be binding, must in England be made by deed, or be supported by a valuable consideration. But the very idea of 'valuable consideration' seems at first sight wholly wanting in Roman Law. It does not appear in Justinian's classification, and in truth although in some cases a valuable consideration was essential to a contract, yet the Romans did not perceive the fact, and fell short of a generalisation that would have assisted them marvellously to clear up the confusion that darkens their system of contract. The Romans started, we need scarcely with our present knowledge hesitate to affirm, with only formal contracts ; that is, con-

tracts in which the legal validity of the promise depended upon the observance of certain forms and ceremonies. Formalism triumphed in contract as in every other department of Roman Law. But the progress of Roman Jurisprudence depended upon the skill with which the jurists were able to liberate transactions from the trammels of form.

The chief direction taken by their beneficent industry was to lay hold of the principle known to English Equity by the name of Part Performance. Where the law requires a certain form to be observed, and an agreement is made by parties without regard to that form, courts of law would not feel called upon to aid their negligence. But if one of the parties, on the faith of the agreement, has done all that he undertook to do, the other party cannot, without something very like fraud, accept such performance, and yet refuse to carry out his part of the agreement. This idea applied at first in a few glaring instances (*mutuum, depositum, commodatum*), was ultimately adopted in the widest generality; and it was laid down that where in a bilateral agreement one of the parties had performed what he had undertaken, the other party could be compelled also to perform his part by an *actio in factum praescriptis verbis*. Such contracts, having no special name,

Innomi-
nate
Contracts.

were said to be innominate. They are comprehended in the well-known *formula* of Paul. 'Either, he says, I give something to you in order that you may give something to me, or I give something to you in order that you may do something for me; or I do something to you in order that you may give something to me, or I do something to you that you may do something for me.' (*Do tibi ut des; do ut facias; facio ut des; facio ut facias.*)

When this result was attained, the Roman Law had achieved a great advance, but it still fell short of the English Law; for unless one of the parties had actually performed his engagements, the contract could not be enforced at the instance of either. In the case of sale, hire, and partnership, a valuable consideration was of the essence of the contract.

*Pacta
Praetoria.*

At this point, strictly speaking, the contracts of the Roman Law are ended. There remains to be noticed the class of PACTS. The Romans were fortunate at one time in the possession of two words, which sharply distinguished agreements enforceable by law (*contractus*) from agreements that did not support actions (*pacta*). But in two instances the Praetors, and in two others, certain Emperors gave actions to enforce pacts. Those introduced by the Praetor (*Pacta Praetoria*) were

hypotheca, already considered (p. 72), and the *pactum de constituto*, to be hereafter explained. ^{Legitima Pacta.} Theodosius and Valentinian enacted that a mere agreement to give a dowry should be binding without any *stipulatio*. Thus the *pactum de constituenda dote* supported an action. Again, Justinian sanctioned the greatest change of all—that a mere promise to give without any consideration (*pactum donationis*) should be enforceable by action. This decision, so strangely at variance with the traditions of Roman law and the principles of general jurisprudence, was dictated by the growing desire of the clergy to encourage gifts to religious persons or for pious uses. These imperial pacts were called *pacta legitima*.

Except in those instances, the term *pactum* was ^{Nudum Pactum.} strictly applied to an agreement not enforceable by action. But from an early period the Praetors allowed such agreements to be used by way of defence. (*Nuda pactio obligationem non parit, sed parit exceptionem.*) In English text-books this maxim is often quoted, but in an entirely different sense. In English Law, *nuda pactio* means an agreement not supported by valuable consideration, an idea which, as we have seen, the Romans did not attain to.

An agreement that could not be enforced by ^{Naturalis obligatio.} action, if it was recognised by law for any purpose,

created a *naturalis obligatio*. No action could be maintained upon a mere natural obligation ; but it was available by way of defence or set off ; if it was voluntarily performed, the debtor could not demand back his money on the ground that it was not due, and was paid by mistake. Again, if a person became surety for a *naturalis debitor*, he could be sued as surety, although the principal debtor could not be sued. A *naturalis obligatio* also was sufficient to support a mortgage ; and it could be the foundation of a novation.

SECT. III.—FORMAL CONTRACTS.

Nexum. The form of *mancipatio*, so extensively employed in the transfer of proprietary rights, was in certain cases, under the name of *Nexum*, employed as a mode of creating contractual obligations. In what cases it was used we do not certainly know, but it seems to have been narrow in its application. It was obsolete long before the time of Justinian.

Stipulatio. The *Stipulatio* was the chief Formal Contract. It may be traced back to a hoary antiquity ; it survived in full vigour to the dissolution of the Roman Empire. It was a verbal contract, and its peculiarity—its form—consisted merely in this, that the promise made must be in answer to a question. ‘Do you promise to give 10 *aurei*?’

'I promise,'—constituted a binding contract. 'I promise to pay you 10 *aurei*' created no legal obligation whatever. In later times this was all the formality required. The words used might be in any language understood by the parties; the answer need not follow the precise terms of the question if there was substantial agreement. The *stipulator* was he that asked the question; the promiser (*reus promittendo*) was the person bound by the answer. Thus to stipulate, in the Roman Law, does not mean to make a promise, but to ask for a promise; the stipulator was always the creditor. Although the validity of a stipulation depended upon its being made orally, there was nothing to prevent, and much to recommend, the practice of recording the terms of the stipulation in writing. The Roman Law established two legal presumptions in favour of such a writing—(1) that it afforded *prima facie* proof that the parties were present; and (2) conclusive evidence that the form of question and answer had been observed. The two weak points in the stipulation—the treacherous character of memory and all disputes as to the observance of the proper form of question and answer—were thus fortified. On the other hand, as the *stipulatio* was a contract necessarily unilateral, it was not adapted for agreements involving reciprocal promises; but the parties

Stipulations reduced to Writing.

might invert the rôle, and make reciprocal stipulations.

Cautio.

In the time of Justinian there existed no contract made by the form of writing. A written acknowledgment of the receipt of money and of an obligation to repay (*cautio*) was in use, but it was not a literal contract. It was merely evidence of the existence of a debt, although evidence which, after the statutory period of two years, could not be called in question. During the Republic there existed a true literal contract, made by an entry (*nomen transcriptitium*) in the account books (*codex*) of the creditor. The *codex* was passing into oblivion in the time of Cicero, and was superseded by the *chirographum*, a writing signed by the debtor only ; or *syngrapha*, a writing signed by both debtor and creditor. These forms of contract, as their names indicate, were of Greek origin. They were known as early as the second Punic War (B.C. 210), and maintained their existence down until the Empire.

*Expen-
satio.*

*Chiro-
grapha.
Syngra-
phæ.*

SECT. III.—PART PERFORMANCE.

Contracts
re.

In the contracts said to be made (*re*) by acts, the legal obligation depended not upon the observance of any forms, but upon the fact that the plaintiff had performed his part of the contract.

Mutuum was the giving of any *res fungibiles* to

another as his property, with the intention that at some future time we shall have returned to us, not the same things, but others of the same nature and quality. *Res fungibiles* are things dealt with by weight, number, or measure, as silver, gold, bronze, money, corn, wine, oil. *Mutuum* was thus a gratuitous loan. It carried no interest, unless an independent obligation was created by *stipulatio* for that purpose. A promise to lend could not be enforced; but if the things were actually lent, it would have been manifestly unjust not to compel the debtor to repay according to his promise.

Pecunia trajectory was a commercial loan, par- Insurance.
taking of the nature of insurance. It was money lent to buy merchandise, to be shipped at the risk of the lender, until the goods arrived at the port of destination.

By a statute passed in the reign of Claudius or Loans to
Vespasian (*Senatus Consultum Macedonianum*), an Sons.
action was refused to any person lending money to a son in his father's power, even if the contract was to repay only on his father's death, unless it was made to procure necessities.

Commodatum was the gratuitous loan of any- Commo-
thing not consumed in the use, and was thus the datum.
complement of *mutuum*—the loan of things consumed by use. As a return for the gratuitous benefit Duties
of the loan, the borrower was bound to take all of Bor-
rower.

reasonable care (*exacta diligentia*) of the thing lent—that is, such care as would be taken by a prudent man, and not merely such care as the borrower was accustomed to take of his own goods. If, however, the borrower used the thing in a different way from that bargained for, he was liable if the thing was lost, even without his fault; and might, indeed, expose himself to an action for theft. Thus, if Titius borrows plate from Gaius to use at supper, and takes it on a journey, and it is stolen by robbers, he is liable to repay it. The lender, on his part, having once given the thing to the borrower, but not before, is bound to suffer the borrower to enjoy the use of the thing according to the terms of the agreement; and he must pay extraordinary expenses to which the borrower may be put. The lender must pay the money spent on a sick slave, or to catch a runaway slave; the borrower paid for food, and even medical expenses, if they were slight in amount. Although the contract was gratuitous, yet good faith required that the lender should not knowingly give things for a use for which they were unsuited. If a man lent vessels to hold wine or oil, knowing that they leaked or would spoil the liquor, he was required to pay the value of the oil or wine thereby destroyed.

Duties of
Lender.

Deposit. *Depositum* was a contract in which a person agreed to keep a thing for another gratuitously,

and to return it on demand. The receiver was not allowed to use it, and for that reason he was not answerable for negligence, but only for fraud. The depositee might, however, if he pleased, agree to answer for negligence as well. When a thing was deposited with a person under distress, as from a riot, or fire, or fall of a house, or shipwreck, the depositee, if he proved false to his trust, was liable like a thief to an action for double the value of the goods deposited. Such a deposit was said to be *miserabile* or *necessarium*.

Pignus was reckoned by the jurists in the class *Pignus* of contracts. It has already been described under the head of Mortgage (p. 71).

Mandatum is not reckoned among contracts *re* Mandate. in the Institutes, but on principle it really belongs to that category.—('Roman Law,' pp. 309, 311, 312, 315.) Mandate is a contract in which one person (is *qui mandatum suscipit, mandatarius*) promises to do or to give something, without remuneration, at the request of another (*mandans* or *mandator*), who, on his part, undertakes to save him harmless from all loss. A mandate might be for the benefit of the *mandans* or of a third person, but not exclusively, say the Institutes, for the *mandatarius* himself. Thus if Titius advised Gaius to invest his money in land, rather than to put it out at interest, and Gaius, acting on the advice, lost by the invest-

For good
of Manda-
tory alone.

ment, he had no claim for an indemnity against Titius. Justinian says this is a piece of advice that Gaius was free to accept or not, rather than a mandate. The decision in this case is right, although the ground upon which it is put is not quite satisfactory. The true question is whether Gaius acted at the request of Titius, and Titius, in consideration of his doing so, promised him an indemnity. It would be contrary to common sense to suppose in such a case that Titius meant to indemnify him. When a man at the request of another acted for the benefit of some other person, it was reasonable to infer a promise of indemnity ; but where a man was advised to do something solely for his own benefit, such an inference would be unreasonable. Nevertheless, if in such a case a person expressly promised an indemnity, a contract of mandate was established.

Examples
of Man-
date.

A mandate might be for the sake of the mandator, as when a man gives you a mandate to manage his business, or to buy a farm for him, or to become surety for him. It might be for the sake of a third person only, as when a man gives you a mandate to manage the business of Titius, or to buy a farm for him, or become surety for him, or lend him money without interest. It might be for the sake of the *mandatarius* and a third person, as when a mandate is given you to lend money to

Titius at interest. It may be for the sake of the mandator and a third person, as when a man gives you a mandate to act in business common to himself and Titius, or to buy a farm for himself and Titius, or to become surety for him and Titius. It may be again for the benefit of the mandator and the *mandatarius*, as when a man gives you a mandate to lend money to Titius for the good of the mandator's property ; or, when you wish to bring an action against him as surety, gives you a mandate to bring the action against the principal at his risk. In all those and similar cases, where some person other than the *mandatarius* had an interest in the performance of the contract, it was considered that the request by the mandator implied a promise of indemnity, if the *mandatarius* should suffer any loss by acting upon the request.

The duties imposed upon the *mandatarius* may be reckoned as four.

(1.) He must do what he undertakes. This duty was not, however, absolute. He might renounce the mandate, provided there was time for the mandator to act himself. If I undertake to go to an auction to bid for a farm for another, by giving reasonable notice before the auction I can relieve myself of the obligation. It must be borne in mind that the *mandatarius* acted gratuitously ;

Renunci-
ation of
Mandate.

if pay was promised to him, he could not withdraw. Again, at the last moment, a *mandatarius* was excused from performing his engagement for good reason shown, as if he were suddenly taken ill, or compelled to leave home on business, or if the mandator became insolvent, or a bad feeling arose between the mandator and *mandatarius*. If the *mandatarius* failed without sufficient reason to perform his promise, he was made liable in damages, on the ground that the mandator had in consequence of the promise of the *mandatarius* not done something he would otherwise have done, and had thereby incurred loss.

Perform-
ance of
Mandate.

(2.) The *mandatarius* must conform to his instructions, on pain of forfeiting his indemnity, and exposing himself to an action for damages for any loss falling on the mandator. Many nice questions arose as to what constituted a substantial fulfilment of a mandate which did not comply with its literal terms. It was settled by Justinian that if a mandate were given to buy a farm for 100 *aurei*, and 110 were given, the *mandatarius* could compel the mandator to take it off his hands at 100. Of course a mandate to buy at 100 was fulfilled by buying at a less sum. A mandate to buy a farm was considered fulfilled by the purchase of one-half of it, unless the mandator expressly stated that he would accept nothing less than the whole.

(3.) A *mandatarius* must take as much care of Diligence. any property he receives as a man of ordinary prudence. This forms a remarkable contrast to the contract of deposit, which like mandate, was gratuitous; and is an exception to the general rule that a gratuitous promisor is liable only for wilful default. This rule, it is not surprising, was not reached without a conflict of opinion.

(4.) The *mandatarius* must give up to the mandator everything he gains by the performance of the mandate, and all rights of action acquired against third parties, and must permit the mandator to sue in his name. In this circuitous way the mandator was brought into relation with the third parties with whom contracts were made at his request; if he could have passed by the *mandatarius* and directly sued such parties as principal, the Romans would have enjoyed a true law of agency. In the absence of such, the contract of mandate afforded no contemptible substitute.

The duties of the mandator are—(1) to pay Duties of Mandator. the *mandatarius* what he has properly expended in executing the mandate; (2) to accept what the *mandatarius* has bought, and to indemnify him against all obligations that he has incurred by an execution of the mandate. As the *mandatarius* was to gain nothing, so he ought to lose nothing, if he properly performed the mandate.

Termination of Mandate. A mandate might be revoked, or, as we have seen, renounced. It was also put an end to by the death of either mandator or *mandatarius*, subject to this qualification, that if the *mandatarius*, in ignorance of the death of the mandator, carried out the mandate, he was entitled to indemnification. It was not considered right that unavoidable ignorance should bring loss to the *mandatarius*.

SECT. V.—SALE (*Emptio-Venditio*).

Sale how formed. Sale is a contract in which one person agrees to give to another for a price the undisturbed possession of anything. This agreement might be made by the parties, if present together, or by letter. It was held binding as soon as the subject-matter of the sale and the price were determined. Writing was not essential to the validity of the contract; but if it was contemplated by the parties that the negotiations for a sale should be finally reduced to writing, Justinian somewhat modified the law. He enacted that either party might withdraw before the contract was written out. If the instrument was not written by the parties, it must be signed by the parties. If it was to be drawn up by a notary (*tabellio*), the contract was not complete until the documents were fully finished in every part. These rules did not apply if earnest

(*arrahae*) was given to bind the bargain. If the buyer refused to proceed, he forfeited the earnest-money ; if the vendor, he had to restore the earnest, and its equivalent in value.

There must be a real price, and it must be coined The Price. money, and no other species of valuable consideration. If a thing were sold for a nominal price, which the vendor did not mean to exact, there was no sale. Mere inadequacy of price did not vitiate the contract, unless it fell short of half the value, in which case, under a constitution of the Emperors Diocletian and Maximian, the vendor could refuse to carry out the contract. It is a moot point whether, if the price were twice as much as the value, the buyer had a similar right to throw up the contract. If no price were fixed by the parties, but they agreed to allow a third person to determine the price, then if that person fixed a price, the contract was complete; but if he did not, the sale went for nothing, as if no price had been determined upon.

In the definition of the contract, it is said that the vendor agreed to give the undisturbed possession (*tradere vacuum possessionem*), which is to be distinguished from ownership. A man had undisturbed possession when he was actually, by himself or his representative, in physical possession, and when no one was in a position to eject him by *Vacua Possessio.*

an interdict. I have elsewhere shown ('Roman Law,' p. 199, *sq.*) that possession of this kind was practically ownership,—the only form of ownership permitted by the Roman Law to persons who were not Roman citizens. In this circumstance is to be found the clue to the distinctive peculiarity, and, it may be added, distinctive anomaly, of the Roman law of sale. The real object of every sale, in Rome as in other parts of the world, was to give the ownership of the thing sold to the buyer, and yet a contract in Rome by a vendor to transfer the ownership of a thing (as distinguished from possession) for a fixed price, was held *not* to be a contract of sale. The Romans accomplished the true end of sale by means that appear singularly cumbrous and inefficient. The vendor was bound actually to give undisturbed possession, and he was bound also to warrant against eviction, that is, to compensate the buyer in the event of his being evicted by law from a part or the whole of the thing sold, for any ground (*causa evictionis*) existing at the time of the sale. The duty to transfer the ownership is thus split up into two parts, which together are not quite equal to the whole,—the duty to give present possession, and to give compensation in the event of future disturbance. The parts were not equal to the whole, because a buyer might be compelled to accept a property with a defective

Warranty
against
Eviction.

title, and before the eviction took place, the vendor might be bankrupt or dead, and an action against him for compensation be wholly worthless. But the Romans were content with this imperfection, for an all-sufficient reason. It was the only means whereby the law of sale could be opened to persons not citizens—the same cause to which is to be ascribed nearly all the profound changes in the form and spirit of the ancient laws of Rome.

The effect of a completed contract of sale was not to transfer the possession to the buyer, but to give the buyer a right to require the possession to be transferred. In the language of jurisprudence, it gave the buyer a right *in personam* as against the vendor, but no right *in rem* to the thing as against any other person. If the vendor, in breach of his contract, transferred the thing to another, the buyer could sue him for damages, but he could not recover the thing itself. Nor did the delivery even of the possession, in the case where the vendor was owner, vest the ownership in the buyer. The buyer became owner only when he had paid the price, unless the vendor had waived his right to payment, and given the buyer credit. In that case the buyer acquired the ownership as soon as the thing was delivered to him.

After the contract of sale, and prior to delivery, it was the duty of the vendor to take good care of

Delivery
of thing
sold.

*Periculum
rei.*

the thing sold, but the profit and risk arising from it were with the buyer. The interest of the buyer as owner thus really dated from the time of the contract of sale. If a mare foaled after the contract, the foal belonged to the buyer; if an inheritance were left to a slave after the price was fixed, the buyer had the benefit of it. On the other hand, if the property were accidentally destroyed or injured the loss fell upon the buyer, and the vendor was entitled to the full price.

Except *res fungibiles*.

In three cases, however, the risk remained with the vendor. (1.) Things sold by number, weight, or measure remained at the risk of the vendor, until they were set apart, numbered, weighed, or measured respectively. The risk, however, was thrown on the buyer if these things were sold in lots (*per aversionem*), as, for example, 'all that lot of corn, or oil, or wine.' This was in fact the same as the sale of specific ascertained goods. (2.) If the sale were conditional, the rule was more complex. Of course, if the conditions were not fulfilled, there was no sale, and all loss or damage fell on the seller. If the conditions were fulfilled, but before that event the thing was destroyed or damaged, the rule was that a total loss fell on the seller, and a partial loss on the buyer. The reason was that, if the thing perished, the seller was not in a position to deliver anything to the buyer when

Except
Condi-
tional
Sale.

the condition happened and the obligation took effect ; but if he could deliver the thing, although damaged or mutilated, he acquitted himself of his promise. (3.) If the agreement were that the buyer had the choice of two things, and one perished, he took the other ; but if both perished, the loss fell upon him, and he had to pay the price. Except
Alterna-
tive Sale.

If the vendor did not deliver at the time he ought, *Mora*, he was responsible not merely for negligence, but for accidental loss. On the other hand, if the buyer did not remove the goods at the time he ought, the vendor was answerable only for wilful misconduct, or extremely gross negligence.

The duties of the vendor are these :—(1) To deliver undisturbed possession ; (2) to warrant against eviction ; (3) prior to delivery to take the same care of the thing (*exacta diligentia*) as a good *paterfamilias*. There remains another and characteristic obligation, (4) the seller must suffer the sale to be rescinded, or give compensation, in the option of the buyer, if the thing sold has undisclosed faults that interfere with the proper enjoyment of it. This duty depended upon the edict of the *Curule Aedile*, a magistrate who, amongst other functions, was charged with the superintendence of markets. His edict in terms applies only to slaves and animals, but its principle was extended to moveables and even to immoveables. In Duties of
Vendor.

Warranty
against
Secret
Faults.

the case of slaves, the edict applied if the slave had any disease or vice, or was in the habit of wandering (*erro*), or was given to running away (*fugitivus*), or if he had committed a delict or a capital crime, or had attempted suicide, or been sent to the amphitheatre to fight with wild beasts as a punishment ; unless any fault of that description was told to the buyer, he had the option of rescinding the sale (*actio redhibitoria*) within six months, or of keeping the slave and demanding a deduction from the price within a year (*actio aestimatoria seu quanti minoris*). In the case of animals, every disease or vice, as biting or kicking in a horse, or a disposition to gore in an ox, had to be disclosed. By analogy it was held that on the sale of a ship there was an implied warranty of soundness, and generally that when an instrument was sold for a purpose, it was not so defective as to be unfit for that purpose. The buyer of land that produced poisonous herbs or grass, could rescind the sale, unless the fault had been disclosed to him.

English
Law.

The rule of the Roman Law is exactly the reverse of that embodied in the maxim '*caveat emptor*.' If both buyer and vendor were ignorant of a fault, the loss fell in Rome on the vendor, in England on the buyer. The origin of the Roman rule is to be sought in the slave market. The

faults of slaves were known to their owners, but could easily be concealed from buyers. It would have been a serious impediment to business if it had been as dangerous to buy a slave in Rome as a horse in England. Accordingly, long before the edict of the Aedile, a practice grew up of requiring from the vendors of slaves and cattle formal guarantees expressed in stipulations; and the Aedile simply extended that idea by creating an implied warranty against all serious faults that were not expressly disclosed at the time of the sale.

The duties of the buyer in a contract of sale were simple. He must pay the price, he must accept delivery of the goods, and he must pay the expenses the vendor incurs in keeping the thing prior to delivery.

Duties of
Buyer.

SECT. VI.—HIRE (*Locatio-conductio*),

Hire (*locatio-conductio*) is a contract in which one person (*locator*) agrees to give to another (*conductor*) the use of something, or to do some work, in return for a fixed sum. This contract is analogous to, but distinguishable from, several other contracts. It agrees with *commodatum* in being a contract for the use of a thing; but *commodatum* is gratuitous, hire is for a price. If a deposit is made gratuitously, or a service is to be

Hire
defined.

Distin-
guished
from other
Contracts.

Hire distinguished
from other
Contracts.

rendered gratuitously, the contract is either deposit or mandate ; but if payment is to be given, it is *locatio-conductio*. Again, if there be a valuable consideration other than money, the contract is not *locatio-conductio*. If, for instance, a man has an ox, and his neighbour too has one, and they mutually agree that each shall lend the other his ox free ten days in turn, then it is not a *locatio-conductio* ; but if one has lent his ox, he can claim the use of his neighbour's ox upon the ground of part performance by the *actio in factum praescriptis verbis*. Although hire is very distinct from sale, yet there were cases in which a difficulty arose. If Titius agrees with a goldsmith that the goldsmith shall, out of his own gold, make rings, and receive 10 *aurei*, it was disputed whether this was a contract of sale or of hire. One view was that it was a compound contract—of sale as regards the material—and of hire, as regards the services of the goldsmith. But it was finally settled that where the workman supplied the material, it was a simple contract of sale ; if he supplied only labour, it was a contract of hire.

Hire of
Things.

The contract of hire relates to land and other things, or to services. And first of the hire of things.

Tenant
had no
Right in
rem.

A tenant of a house or farm in the Roman Law had no right *in rem* to the subject, but only a right

in personam against the landlord. In other words, if evicted by his landlord or even by a stranger, he could not invoke the aid of the interdicts by which possession was restored; he could only bring an action for damages against his landlord for breach of contract. The landlord could alone sue the disturbers, but if he failed to do so, he committed a breach of contract.—('Roman Law,' pp. 210, 334.)

The duties of the landlord (*locator*) were—
 (1.) To deliver the thing to the tenant (*conductor*), and permit him to keep it for the time agreed upon. If the landlord by his own fault deprived the tenant of his holding before the end of the lease, he must pay full compensation (*id quod interest*); but if the tenant was evicted through no fault of the landlord, the tenant could claim only a remission of the rent, and not damages. Thus if the house was burned down, or the thing let was carried off by robbers, or the farm was confiscated, the tenant was released from rent, but was not entitled to compensation. (2.) The landlord was bound to keep the thing in such a state that the hirer could enjoy the use agreed upon. If the thing deteriorated and was not repaired, the tenant could demand a reduction of the rent, or a release from the contract. Trifling repairs were to be executed by the hirer. (3.) The landlord was responsible if the thing let had such faults as were

Duties of
Landlord.

Landlord
bound to
Repair.

Warranty
of Fitness.

likely to cause damage. If a landlord let a farm, along with the vats or jars used in wine-making, and the vats were rotten, and the tenant lost his wine, the landlord must pay the value of the wine.

Removal
of Fix-
tures.

(4.) The landlord must permit the tenant to carry away not only moveables but even fixtures placed by the tenant, provided the tenant did not injure the house. A tenant of land was entitled to compensation for unexhausted improvements, except such as he had specially agreed to execute in consideration of a lower rent. The measure of compensation was the increased value of the land.

Unex-
hausted
Improve-
ments.

Duties of
Tenant.

The tenant was bound—(1.) To pay the rent, with interest if it was in arrear. If rent of a house or farm were in arrear for two years, the tenant could be evicted. In certain cases the landlord was obliged to remit the whole or a part of the rent on account of loss or damage to the crops.—('Roman Law,' p. 337.) (2.) The tenant must occupy during the term agreed upon, or at all events pay the rent. (3.) The tenant or hirer must exercise due care. He was responsible if the thing was stolen, but not if it was carried away by robbers. (4.) The tenant or hirer must give up the thing upon the expiration of the term agreed upon.

Hire of
Services.

In the hire of services the jurists, misled by a false analogy, fell into confusion. The hirer pays

the price, the letter gives his services. If the services were not rendered in respect of a particular thing, as the services of a messenger or secretary or domestic servant, the employer was correctly described as *conductor operarum*, and the servant as *locator operarum*. But if the work was to be done in respect of a particular thing, as by a jeweller, or builder, or tailor, or carrier of goods, the jurists called the employer the *locator operis*—that is, of the thing to be worked upon—and the workman the *conductor operis*.

The servant or workman was bound—(1) to do the work properly in the manner agreed upon ; Duties of Workman. (2) he must take good care of the things entrusted to him, and was bound to pay their value if they were lost or injured through his negligence or unskilfulness. The employer, on the other hand, was bound to pay the wages agreed upon.

JETTISON (*Lex Rhodia de Jactu*).—An interest- Jettison. ing case of hire was that of a carrier of goods in ships. The customs, known as the maritime law of Rhodes, were accepted as law by the Romans when they did not conflict with special legislation. Jettison was where, in order to save a ship, a portion of the cargo was thrown overboard. The loss was divided between the owners of the goods lost and the owners of the vessel and of the cargo saved. The owner of the vessel was also entitled

to contribution when a mast was cut to save the vessel, but not for repairs of damage done in a storm in the course of the voyage, although the repairs were necessary to enable the vessel to continue the voyage. The owners of the goods lost had no direct action against the owners of the goods saved; but they could sue the shipowner on the contract of hire for the purpose of requiring him to keep the goods until the contribution was paid; or, if these had been delivered, to allow them to sue the owners of the goods in the shipowner's name.

SECT. VII.—PARTNERSHIP (*Societas*).

Partnership defined.

Partnership (*societas*) is a contract in which two or more persons combine their property, or one contributes property and another labour, with the object of sharing amongst themselves the gains. There cannot be a partnership in which one partner contributes nothing—neither property nor labour. A partner might share in the profit and not in the loss, but a partner could not share in the loss only and not in the profit. Such a partnership (*Leonina Societas*) could be made only from a charitable motive; and it was necessary in this contract that there should be a valuable consideration moving from each of the partners.

Roman and Modern Law.

A profound difference is to be remarked between partnership in the Roman Law and partnership

in modern systems of law. The most important aspect of partnership is the relation between the partnership and third parties who enter into transactions with any of the partners. Every partner within the scope of the business is an implied agent of the other partners, and can bind the assets of the partnership. In Rome this was wholly wanting. The Roman Law of partnership deals only with the claims of partners as between themselves. The *actio pro socio* has no wider scope; and third parties had no direct remedy except against the individual partner with whom they contracted.

Partners
not implied
Agents.

Partnership was formed by the consent of the parties. If nothing was said as to the shares of the partners, they took equal shares. If the share is expressed in one case only, whether of profit or loss, but omitted in the other, then in the other case that has been passed over the same share must be kept to. By express agreement, however, the share of loss might be different. Thus one partner might have two-thirds of the profit and one-third of the loss, and the other partner one-third of the profit and two-thirds of the loss. As in the case of Sale and Hire, the determination of the shares might be left to a third party.

Shares of
Partners.

Partnership was ended — (1.) By renunciation.

Dissolu-
tion of
Partne-
ship.

Any partner might dissolve the partnership if no time was fixed for its duration, and if he did not act with a view to appropriate to himself what would otherwise have fallen into the partnership estate. A partner who withdrew without justification divested himself of all his rights as a partner, but remained liable for all obligations (*socium a se, non se a socio liberat*). (2.) By the death of a partner, because, in entering into a contract of partnership, a man chooses for himself determinate persons as his associates. Even if the partnership was formed by more than two persons, the death of one dissolved it although several survived, unless it was otherwise agreed when they joined in partnership. (3.) By the loss of liberty or citizenship by any partner. (4.) The bankruptcy of one of the partners, or the confiscation of all his property, dissolved the partnership. But in this case, if the members agree to go on as partners, a new partnership is begun. (5.) A partnership is at an end when it was formed for some special business, and that business is finished. Again, a partnership is terminated—(6.) By the loss of the partnership property; (7.) By the lapse of time for which it was formed; and (8.) By one of the partners commencing an action to enforce his rights.

Kinds of
Partner-
ship.

Five kinds of partnership were distinguished—

(1.) Trade Partnership (*Societas universorum quae*

ex quaestu veniunt); such as that of bankers or money-lenders. This was the partnership understood to be made, if no other form was specially agreed upon. The partners contribute definite property, and they divide the profits arising from it according to their shares.

(2.) Partnership for a single transaction (*Societas negotiationis alicujus*), as when one person contributes three horses to a team and another one, in order by selling them together to realise a higher price.

(3.) *Societas vectigalium*, or a partnership between persons farming out the taxes.

(4.) *Societas unius rei*, or joint-ownership, is not a contract, but was considered under that category, because where joint-ownership had originated by agreement between two persons, they could employ the *actio pro socio* for an account as between them.

(5.) *Societas universorum bonorum* resembles the Hindoo institution of the joint family. It means that two persons agree to have a common purse. All that they acquire, from whatever source, becomes joint-property, and they are entitled to have all their debts and expenses paid out of the common fund.

The reciprocal rights and duties of partners were few and simple. 1. Each must contribute what has been agreed upon, and whatever he gains

Duties of
Partners.

in respect of partnership transactions. 2. Each is entitled to be reimbursed all expenses properly incurred, and to be indemnified in respect of all the obligations he undertakes on behalf of the partnership. 3. Each partner was liable for wilful default (*dolus*), but not for negligence in the ordinary sense. It was enough that a partner displayed such diligence and care in regard to the partnership concerns as he usually did in regard to his own. This was decided on a ground that would equally apply to all contracts whatever—that a man who takes to himself a partner lacking in diligence has nobody to complain of but himself.

SECT. VIII.—EXTINCTION OF CONTRACTS : NOVATION.

Contracts were extinguished (1) by actual performance (*solutio*) or its equivalents; (2) by release; (3) by prescription; (4) by suit (*litis contestatio*); and (5) by merger (*confusio*).

Performance.

1. *Solutio*.—Every obligation may be discharged by the giving of what is due, or, if the creditor consents, of something else in its place. It matters not who discharges it, whether the debtor or someone else for him; for he is freed even if someone else discharges it, and that whether the debtor knew it or not, and even if it was done against his will. If, without the fault of the promisor, it becomes impossible to fulfil the promise, generally

the promisor was discharged. A. promises by stipulation to give a small plot of land to another. Before doing so, the owner of the ground buries a dead body in it, and so makes it *religiosa* and *extra commercium*. A. cannot be compelled to pay damages for non-performance.

2. Release is of two kinds—formal and non-formal. The Roman Law started with the idea that no debtor could be released, except by a proceeding analogous to that by which he bound himself. (*Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est.*—D. 50, 17, 35.) Hence a contract of *nexum* made by *mancipatio* must be dissolved by *mancipatio*; a contract by stipulation must be dissolved by stipulation (*acceptilatio*); a contract formed by writing (*expensum ferre*), by written release (*acceptum ferre*). This rule, founded on a false analogy, was inconvenient, and an ingenious device was introduced by Gallus Aquilius, a colleague of Cicero. If by an existing contract a person was bound to do or give anything, and he afterwards by stipulation promised to do or to give the same thing, then the original contract was considered at an end, and its place taken by the stipulation, upon which alone henceforth the promisor could be sued. Taking advantage of this peculiarity, Aquilius introduced a general form embracing every kind of obligation,

Formal
Release.

Aquilian
Stipulation.

and converted all these obligations into a single stipulation. Then, by another stipulation, the creditor released this obligation, and thus all the obligations of one person to another could be discharged at a single stroke.

Non-
formal Re-
lease.

By a formal release, the legal tie (*vinculum juris*) was broken. If there were sureties, they were *ipso facto* released ; if the release was made to one of several co-debtors, all were immediately free. At first the Roman Law recognised no release from a formal contract except a formal release. But at length the Praetor interfered to protect a debtor whom his creditor had agreed to acquit, but without observing the appropriate formalities. If a creditor agreed not to sue, it was against good conscience afterwards to allow him to molest the debtor. The Praetor gave effect to such an agreement (*pactum de non petendo*) by refusing to the creditor his legal remedy. This was not quite the same thing as a release. A formal release wholly extinguished the obligation for every purpose ; an agreement not to sue might operate in favour of some of the parties and not of others ; it might be subject to conditions ; everything depended on the terms of the agreement. Thus in the case of a suretyship, a release by *acceptilatio* of either principal or surety put an end to the suretyship ; but an agreement made with

Pact not
to sue.

a surety did not create even a presumption in favour of the release of the principal, although an agreement not to sue the principal was *prima facie* an acquittance of the surety. The reason was that if the surety were called on to pay, he would have his indemnity from the principal, who would thus in the end derive no benefit from his acquittance.

3. *Statutes of Limitation*.—No general statute of limitations for obligations was introduced until far down in the Empire, by Theodosius, in A.D. 424. Actions derived from the *jus civile* were perpetual, and so strong was the idea of an obligation as a chain (*vinculum*) that the Romans had some difficulty in conceiving the possibility of its being unloosed except by the proper legal key. No such difficulty affected the Praetor. When he interfered in derogation of the civil law, his action was always regarded as an extraordinary stretch of power, fully justified and required by natural justice, but still anomalous. Penal actions created by the Praetor must be brought within one year; but actions brought in for the recovery of property were perpetual. In the latter, as in most other cases, the statutory period of limitation in the time of Justinian was thirty years. Prescription.

4. When an action was commenced and had gone so far as to be referred to an *arbiter* or *judex* (*litis contestatio*), the obligation was gone.

5. Before the change in the law introduced by Justinian, if an heir was either debtor or creditor to the person whom he succeeded, then as the heir and the deceased were in law regarded as one person, the debt was extinguished (*confusio*).

Novation
defined.

NOVATION.—In its most general sense, *novatio* means any change in the form or in the parties to an obligation. Thus if A. owes 10 *aurei* to B., we may have three principal changes. B. may transfer his right to C. A. will then be debtor to C.

Or B. may accept D. as his debtor in place of A. D. will then owe the 10 *aurei* to B.

Or, while A. and B. remain the same, the simple debt of 10 *aurei*, arising, for example, from a sale or loan, may be changed into a sum due by stipulation.

Transfer
of Claims.

A creditor could, without the consent of the debtor, transfer his right to a third party. Upon giving notice to the debtor, the new creditor could in his own name bring an action for the debt, subject to the right of the debtor to set up against him whatever defence he had against the original creditor. To prevent debtors being too much harassed, the law, in the time of Justinian, was that a transferee of a claim could not receive more than he paid for it with interest.

Delegation. When, by the consent of the creditor, a new

debtor was substituted for the old, *delegatio* was said to take place. It was done by the creditor stipulating with the new debtor for the debt; by which means the old obligation was taken away. Justinian made a very important change in the law on this point. The principle of the Roman Law was, that whether a new stipulation for the same object as an existing obligation took away that obligation or not, depended entirely upon the intention of the parties. But a number of presumptions were introduced as to the circumstances in which such an intention was to be inferred. Justinian removed all doubts by enacting that there should be no novation, unless it was expressly declared by the contracting parties that such was the aim of their agreement. If not, both the original and the new obligation remained in force.

Change by
Justinian.

Again, while the parties to a contract remained the same, the form of their contract might be altered. The common case was the merger of an obligation by making a *stipulatio*. The enactment of Justinian just stated applied to this case as well as to *delegatio*.

SECT. IX.—SURETYSHIP.

When one person undertook to answer for the debt or obligation of another, whether as his

Contracts
of Surety-
ship.

substitute by novation (*expromissor*), or in addition to him (*adpromissor*), he was said to be an *intercessor*. The contract of suretyship could be made by stipulation (in three forms), by mandate, and by the *pactum de constituto*. Earliest in point of time are the forms of suretyship by stipulation.

Sponsio. The oldest of all (*Sponsio*) could be made only by Roman citizens, and only as ancillary to a debt

Fidepromissio. created by stipulation. *Fidepromissio* (so called from the words used, *Fidepromittis? Fidepromitto*) was likewise ancillary to stipulations, but it could be made by aliens as well as by citizens. Both forms were obsolete in the time of Justinian, and

Fidejussio. they had been long replaced by *fidejussio* (from the words *Fidejubes? Fidejubeo*), which could be annexed not merely to stipulations but to every species of

Mandate. obligation, whether natural or civil. By mandate also, without *stipulatio*, a suretyship could be constituted. Thus, if Titius, at the request of Gaius, lent money to Maevius, an obligation upon Gaius was implied to make good the amount if Maevius failed to repay it. Thus Gaius was a surety. Necessarily, however, such a liability could arise only in respect of future debts, incurred by the creditor on the faith of the mandate. If the debt actually existed, and the creditor pressed for payment, anyone who promised to see the debt paid, in consideration of the creditor forbearing to sue,

*Pactum
de Con-
stituto*.

became a surety. Such an agreement was called a *pactum de constituto*.

Women were prohibited by the *Senatus Consultum Velleianum* (temp. Vespasian, probably) from undertaking to answer for the debt of others, whether as sureties or as substitutes (*ex-promissores*). Custom refused to women not only offices of state, but business duties, which imply their going into the company of men away from their own homes. They were therefore prohibited from undertaking gratuitous responsibilities, and exposing their property to danger. The terms of the enactment were sweeping. It forbade every woman to make any contract or give any of her property as security on behalf of any person (even a husband, son, or father) to any creditor. An *intercessio* by a woman was wholly void.

Women
not Sure-
ties.

According to the law as it stood in the time of Justinian, the surety could not be sued until the principal debtor had made default (*beneficium ordinis*), except in the case of bankers, who had the option of suing the surety first. If the principal debtor was beyond the jurisdiction, and could not be sued, the surety was allowed a reasonable time to bring him into court, and, if he failed, could himself be sued in the first instance. The creditor, if he compelled the surety to pay, must surrender to him every mortgage or pledge that he had in

Debtor to
be sued
before
Surety.

respect of the debt. In the event of the surety being required to pay, he was entitled to sue the principal debtor to repay him the amount. His remedy was the *actio mandati*.

Contribution between Co-Sureties.

CO-SURETIES.—Before the time of the Emperor Hadrian there existed no kind of right to contribution between co-sureties, where one only had been sued and compelled to pay the whole debt. A surety when sued could object to pay unless the creditor first transferred to him his right of action against the other sureties (*beneficium cedendarum actionum*). But Hadrian introduced a species of contribution (*beneficium divisionis*). The surety who was sued could require the creditor to divide his claim among the sureties that were solvent at the time issue was joined in the action. If any of the sureties were insolvent, the burden upon the rest was increased. But if the surety neglected to claim the privilege of division, and the creditor obtained the whole amount from him, there was no right of contribution against the co-sureties.

SECT. X.—QUASI-CONTRACT.

Implied Contracts.

English lawyers distinguish between express and implied contracts. Under the name of implied contracts are included many true contracts, when the consent of the parties has not been expressed

but may be reasonably inferred ; but other obligations are included that are not based on the consent of the parties, and are not contracts at all. The term 'quasi-contract' might conveniently be borrowed from the Roman Law as a name for those obligations, or rights *in personam*, that are not derived from the consent of the parties, but are imposed by law regardless of their assent or dissent. The chief examples in the Roman Law are the *Condictio Indebiti* to recover money paid by mistake, and the *actio negotiorum gestorum*.

Money paid under a mistake of fact could be recovered, but as a rule not money paid under a mistake of law. If the money were a debt of honour (*naturalis obligatio*) and voluntarily paid, it could not be demanded back. Money paid by order of a court is not money paid by mistake, even when the order is wrong. So money paid to avoid the risk of a penalty is not considered as paid by mistake. The general rule was that a person was to suffer from ignorance of law, but not from ignorance of fact. The reason assigned was, that the law is, or ought to be, knowable ; but the most prudent man cannot know everything. The ground upon which the Roman jurists placed the distinction seems to rest upon the idea of negligence, so that a man could not plead ignorance of a fact that was well

Money
paid by
Mistake.

Ignorance
of Law
and Fact.

known to everybody but himself. Minors under twenty-five, women, soldiers, peasants, and some others were not made responsible even for ignorance of law.

Negotiorum gestio.

The *Negotiorum gestio* is to be compared with mandate. To act on behalf of another at his request was mandate; to act for him without his knowledge or request was *negotiorum gestio*. This was introduced for public convenience, lest when men were forced to hurry away suddenly, and went from home without giving any one a mandate to look after their affairs, their business should be neglected. No one, under such circumstances, would attend to the interests of the absent if they had no action to recover what they spent. The *negotiorum gestor*, although he acted gratuitously, yet interfered voluntarily, and was bound to act with the care of a good *paterfamilias*; it was not enough to use the diligence he ordinarily displayed in his own affairs.

SECT. XI.—DELICTS.

Division of Delicts.

Delicts or wrongs may be against the person or against property. In the Roman Law this distinction is very emphatic. A wrong to the person was an *injuria*; harm done to property was *damnum injuria*.

Injuria.

Injuria is when a person, either intentionally or

by negligence, violates any right that a free man has in respect of his own person. It thus includes a multifarious variety of wrongs, as striking or whipping a man ; kidnapping or falsely imprisoning him ; reviling a man in public (*convicium facere*) ; defaming a man either by words or writing, or even by acts. Thus it was defamation to take possession of a man's goods, as if he were insolvent, when he owed nothing. Again, it was an *injuria* to enter a man's house against his will, even to serve a summons. Attempts directed against chastity, and the administration of love-philtres, were *injuriae*.

An assault was not an *injuria* if committed in self-defence. When one's life or limb was threatened, any amount of force to repel the injury was lawful, if it was reasonably necessary. A man put in fear of his life could, with impunity, kill his assailant ; but if he could have caught the man, and there was no necessity for killing him, he was not justified. In defence of property less latitude was allowed. Even a burglar could not be lawfully killed, if the householder could spare his life without peril to himself. Any less violence was, however, justifiable in defence of property.

An *injuria* was held to be aggravated (*atrox*) by considerations—(1) of the nature of the act, as when a man is wounded, or scourged, or beaten

Self-
Defence.

Aggra-
vated
Injury.

with sticks ; (2) of the place, as when the assault is in a public assembly ; (3) of the person, as when parents are struck by children, or patrons by freed-men ; (4) or of the part wounded, as a blow in the eye. In these cases exemplary damages were given.

Slaves and
Injuria.

There could be no *injuria* to a slave. A slave was susceptible of damage, of depreciation as a money-making machine (*damnum injuria*), but not of *injuria*. In two ways, however, a more humane doctrine was established. First, it was held that whipping a slave was a constructive insult to the master, whose exclusive privilege it was to flog his own slave ; and thus, although the slave was not injured, the master could sue for the insult to himself. Again, when the injury was severe, the Praetor granted an action to the master, even when from the circumstances there could have been no intention to insult the master. In the case of persons under

Filii-
familias.

potestas, the rule was that they could suffer *injuria* ; but only their *paterfamilias* could, except in certain rare cases, sue for the injury. The *paterfamilias* sued both on his own account and his son's, and was entitled to damages on both grounds. In like manner, a husband sued for *injuria* done to his wife.

Wives.

Division of
Wrongs to
Property.

Wrongs to property are to be distinguished in the Roman Law in the case of moveables

and immoveables by the nature of the respective remedies. A right to a moveable may be violated in several ways; first, by depriving the owner of possession, and that either by stealth (*furtum*) or by violence (*vi bonorum raptorum*); and, secondly, without depriving the owner of possession, by damaging his property, and impairing its usefulness (*damnum injuria*).

Theft is defined in the Institutes of Justinian to be the dealing with an object, or with its use or possession, with intent to defraud. To deal with the use or possession of a thing in a manner forbidden by the owner was theft. Thus if a creditor, who is entitled merely to the possession of the thing pledged, used it; or if a person with whom a thing was deposited for custody only, used it; or if a person borrowed a thing for one purpose and used it for another—in all those cases the parties were guilty of stealing the use (*furtum usus*). If an owner who had pledged a thing secretly carried it off from the creditor, or an owner finding his own lost property in the lawful possession of another, surreptitiously took it away, the owner was said to steal the possession of the thing (*furtum possessionis*). When a person attempted to seduce a slave to steal his master's property, and, in order to catch the tempter the master allowed the slave to carry some goods to him, the old jurists were in

Theft : its
Kinds.

great perplexity, because the owner seemed to have consented to the removal. Justinian brushed aside the difficulty, and declared that not only the action for theft, but the action for corrupting a slave (*actio servi corrupti*) should be brought against the tempter.

Theft from
Persons
interested. An action for theft could be brought not merely by owners, but by any one who, in consequence of being responsible for the loss of anything, was interested in its safe custody. Every person who was under a legal obligation to take care of any property was considered in fault if the thing was stolen. Thus, if a fuller or tailor takes clothes to be cleaned and done up or to be mended for a fixed price, and they are stolen from him, it is he, and not the owner, that can bring the action for theft. The owner had no interest, as he could sue the fuller or tailor for the value of the things stolen. But if the fuller or tailor were insolvent, the owner was allowed to sue the thief. A similar rule prevailed

Hirers. in the case of gratuitous loan (*commodatum*) till Justinian altered the law. Justinian gave the owner an option of proceeding either against the borrower or against the thief. If the owner knew that the thing was stolen, and commenced an action against one, he was not allowed to stop that action and sue the other. He had made his election. If, however, he began an action against the

Borrowers.

borrower in ignorance of the theft, he was allowed to give up his claim against the borrower and to proceed against the thief. If the thief were solvent, there was an advantage in suing him, as he was liable to a penalty of double the value of the thing stolen. In the case of a gratuitous deposit, the Depositee, person with whom the thing was deposited was not answerable for negligence, and therefore not for loss by theft. Accordingly in this case the owner, and not the depositor, had the action against the thief.

In the Roman Law, theft was treated as a mere Criminal civil wrong subjecting the culprit to an action for Thefts. penalties ; but not even in the latest times, except in a few aggravated cases, to punishment as a criminal. Cattle-stealing, burglary, housebreaking, stealing from public baths, or from a house on fire, were punished criminally ; but in other cases the thief was exposed merely to a civil action. The Civil penalties varied according to an ancient and curious Penalties. rule. If the thief was caught in the act (*furtum manifestum*) the penalty was fourfold the value of the thing stolen ; if he were not (*furtum nec manifestum*), the penalty was twofold (besides restitution of the stolen property). Many subtle questions were raised upon this distinction. Justinian decided that it was manifest theft so long as the thief was seen or taken in possession of the stolen goods by

any one, before he reached the place where he meant to carry them and lay them down.

Robbery. In the case of robbery (*actio vi bonorum raptorum*) the penalty was fourfold if the action was brought within a year; after a year, only for the value. The fourfold penalty included the recovery of the thing taken. The rules relating to robbery are but a repetition of the rules applicable to theft. But at this point Justinian notices the distinction between robbery and the violent seizure of goods under a claim of right. By statute, it was established that if an owner forcibly reclaimed his property, he should forfeit it to the person from whom he took it; if a person, not owner, but thinking himself owner, did so, he was bound to restore the property, and then pay its value.

Damnum injuria. The law relating to damage to property (*damnum injuria*) rests on the provisions of a plebiscite, known as the *lex Aquilia*, carried by Aquilius, a tribune of the plebs, in B.C. 286. This law abrogated and superseded the provisions of the earlier law, including the XII Tables. It was not a scientific enactment; it distinguished only two classes of injuries, each characterised by a distinct and arbitrary measure of damages. The first class was the killing of a slave or four-footed beast reckoned among cattle. The penalty was the highest value that the property bore within the year preceding.

All other damage to slaves, animals, moveables or even immoveables, was included in the second category, and the measure of damages was the highest value within the thirty days preceding the injury. If the defendant denied his liability, and was condemned, he had to pay double damages. The enactment, as it was drawn, made no provision for indirect injuries. Thus to throw a stone at a horse and hurt him entailed liability; but to lay down a stone and trip a horse was not visited with damages. This defect was remedied by the Praetor. The statute gave an action only when the damage was done to a body by a body (*corpore corpori*); but the Praetor after the analogy of the statute gave a remedy when the damage was done not directly by the body (*non corpore sed corpori*), and even when no damage was done to the thing itself (*nec corpore nec corpori*). In the first case, the action was said to be *utilis*; in the second case, *an actio in factum*, as it was called, was granted. Thus if I shut up another man's slave or cattle, and starve them to death, or drive a beast so furiously as to founder it, or terrify cattle to rush over a cliff, or persuade another's slave to climb a tree or go down a well, and he in climbing or going down is either killed or injured in some part of his body, then against me an *actio utilis* is given. If, on the other hand, a man thrusts

Direct and
Indirect
Damages.

another's slave from a bridge into a river, and the slave is drowned, then he is directly liable within the words of the statute, as it is with his body he did the damage. If, again, a man moved by pity frees another's slave from his fetters to release him, he hurts the master, but not the body of the slave; and in this case provision was made by the *actio in factum*.

Negli-
gence.

To support an action under the *lex Aquilia*, it was essential, however, that there should be not merely harm (*damnum*), but wrong (*injuria*). The damage, to be actionable, must be done either intentionally or by negligence. What constituted negligence depended upon circumstances. Two cases are cited in the Institutes. A man playing with javelins kills a slave passing by. Is he liable? If he was a soldier practising in the Campus Martius, or in any other place set apart for soldiers' practice, that did not imply negligence; but if any one else, or a soldier elsewhere, did so, the striking would *prima facie* amount to negligence. Again, if a pruner, by breaking down a branch from a tree, kills your slave as he passes, near a public road or path used by neighbours, and he did not first shout and warn the slave, he was guilty of negligence. If, on the other hand, the place was quite off the road, or in the middle of a field, he was not liable for negligence, even if he did not

shout. Want of skill was considered equivalent to negligence for the purpose of the *lex Aquilia*; as, for instance, when a doctor kills a slave by bad surgery or by giving him wrong drugs. So if a rider or a muleteer runs over a slave he is chargeable with negligence if the damage resulted from want of skill, or even from want of the strength of an ordinary man.

In estimating the compensation due to the owner, usage authorised the judges in going beyond the actual value of the slave or thing destroyed, and taking account of the loss accruing to the owner. If one of a pair of mules or team of horses was killed, or one slave out of a band of comedians or singers, the reckoning includes not merely the animal or person killed, but in addition the depreciation in value of the rest. So, if a slave who is killed has been appointed heir to a man whose estate is worth 1000 *aurei*, and by his death the inheritance is lost to his master, then the damages include, in addition to the value of the slave, 1000 *aurei*.

Immoveables, in regard to wrongs, are in a different position from moveables. Immoveables cannot be stolen; and if a possessor is wrongfully ejected, the law can actually restore his property, and not merely give him an equivalent in damages. In the Roman Law, the remedy for wrongful

ejectment was not technically called an action, but an interdict (*Interdictum de vi et vi armata*). Every injurious act done to an immoveable without the consent (*clam*) or against the will (*vi*) of the owner, exposed the offending party to the interdict *Quod vi aut clam*, by which he was compelled to pay the expenses of undoing the mischief.

Quasi-Delict.

QUASI-DELICTS.—The wrongs above enumerated alone were called delicts; other wrongs were said to arise *quasi ex delicto*. In this case the prefix *quasi* indicates merely that the wrongs so described did not attract the attention of the law until a comparatively late period, when the denotation of '*delictum*' was fixed by usage. Between a delict, therefore, and a quasi-delict there was no real distinction. The quasi-delicts mentioned in the Institutes may be briefly noticed.

Wrong Judgment.

If a *judex* gave a corrupt decision, or gave a decision beyond the terms of the reference, he was liable to an action for damages at the suit of the injured party.

Suspensa.

Persons who kept anything so placed or hung that it might, if it fell, do harm to a person passing by, were subject to a penalty of 10 *aurei*, even if no one was hurt.

The occupier of a house was liable for damages done to any one by anything thrown out or poured down from the house, although the mischief was done not by the occupier himself, but by some one else. *De Effusis et Dejectis.*

A master of a ship was liable for any loss by theft or damage to any goods in the ship through the misconduct of the sailors employed in the ship. *Edict Nautae, Cauponae, etc.*
The same responsibility attached to innkeepers and livery stable-keepers for goods left in the inn or in the stables.

CHAPTER V.

THE LAW OF INHERITANCE AND LEGACY.

SECT. I.—TESTAMENTARY SUCCESSION.

THE subject we now approach may be regarded as at once the most interesting and the most tedious branch of Roman Law. In its broader aspects, it supplies a fascinating chapter in the history of thought ; to enter into all the detail that we find even in the Institutes would not be very instructive, and would certainly be dull. The great central fact is that the idea of a testamentary disposition of property, which, but for the plain teaching of history, we should consider of the very essence of ownership, was reached by slow and tortuous steps.

Contrast
of Ancient
and Modern
Will.

Sir Henry S. Maine has drawn attention to the sharp contrast that exists between a modern will and the instrument from which it is historically derived. A will is a secret document ; it is revocable during life, until the termination of which it has no effect. The old will of the Roman Law

was a conveyance *inter vivos*; it consequently took effect at once, was irrevocable, and was made openly in the presence of a number of witnesses. But that is not all. The purpose of a modern will is to divide property; the testator stands face to face with the legatees; an executor is appointed merely for convenience in winding up the estate. The primary purpose of a Roman will (even in the time of Justinian) was to appoint an executor—in other words, a universal successor to the deceased; if it failed in that, it was wholly worthless. From the legal standpoint, the nomination of the executor was the whole object of the will. That which in the real purpose of the testator was the first and paramount object—the distribution of his property—was in the eyes of the law a secondary and quite subsidiary point. Nothing can be more puzzling to a student of law than the wholly inverted manner in which, according to modern ideas, even the most recent productions of the Roman intellect deal with the subject of wills and legacies. To understand how this came about, is to master nearly everything that is of interest in this department of Roman Law.

The earliest notions of succession to deceased persons are connected with duties rather than with rights, with sacrifices rather than with property. In the Hindoo Law, the heir or successor is the

Hindoo
Heirs.

Universal
Succession.

person bound to offer the funeral rites required for the comfort of the deceased's soul ; and even in the Roman Law there are not wanting indications of the same fact. The property of the deceased was the natural fund to provide the expenses, in some systems of religion by no means inconsiderable, of the necessary religious ceremonies. In the Roman Law, until the change, presently to be stated, made by Justinian, the heir was considered to stand in relation to third parties as more than a representative of the deceased, as actually continuing his legal personality. The heir succeeded to all the rights and liabilities (*in universum jus*) of the deceased ; and just as a person is not excused from paying his debts because he has insufficient means, so it was no answer to a creditor when suing an heir for money due by the deceased that the deceased had not left him funds wherewith to discharge his debts. Up to the alteration of the law by Justinian, *the heir was bound to pay all the debts of the deceased, even if he obtained no property from him whatever.* An insolvent inheritance was thus a veritable *damnosa hereditas*.

Intestate
Succession
most
Ancient.

The history, not of Rome alone, but of other nations, shows that in the earliest times the heir was the person designated by nature to perform the duties of filial piety to the deceased. The

children, or failing them, the more distant kindred, were the only successors dreamt of by the men who made the institutions of the Indo-European family. But children and kin sometimes fail. To persons actuated by the ideas and feelings of a modern European, such a circumstance would not be considered as an evil of a grave order. Far otherwise was it with men who devoutly practised the worship of ancestors, who believed that the spirits of their fathers hovered around the household hearth, and required such nourishment as could be derived from the ghost of food sacrificed to them. To die childless was to leave the perturbed spirit of the father without rest or food ; from the natural protector of his house he became a malignant ghoul. The records of ancient law show many traces of the absolute horror with which the fathers of our race contemplated their disconsolate state if they died without children, and by consequence without heirs.

The ingenuity of men first provided in the fiction Adoption of adoption a remedy for this emergency. He that had no child was allowed to select a son. When in the course of nature he died, this artifice provided him with an heir. It is a disputed question whether the Hindoos ever advanced nearer to a law of testamentary succession than this rude device ; and it is a significant fact, that the ancient

forms of adoption of the Roman Law correspond point for point with the earliest forms of true testamentary succession. Accordingly, to the Roman Law we must turn for the development of this idea.

Testamen-
tary Suc-
cession.

Testamentary succession did not make a real beginning until men accepted the idea of the direct appointment of an heir, without going through the intermediate stage of sonship. The first testamentary heir is he that succeeds, not by natural succession, but by the will of his predecessor, directly to the deceased without being first his son. This stage is exemplified by the Roman Law. During the thousand years through which we trace the evolution of Roman genius in the region of law, one grand, central idea dominates the whole law of wills. It is that the function of the Will is to name an heir. The conception of a legacy—of the gift by the deceased of a specific part of his property to a legatee—was originally no part of the will, and might almost be said to be alien to it. Indeed, the history of this portion of the law may be summed up in the statement, that the legacy gradually encroached upon, and ended by almost superseding, the idea of universal succession, upon which was based the first introduction of wills. The Legacy came into being when first the law permitted the testator to enjoin commands

upon the heir as to what he would do with this or that article of property, and when the heir was compelled to execute those commands. Finally, as will appear, if we penetrate through an outer crust of forms and a somewhat tangled story of legal learning, we shall find the Roman Law reaching a point scarcely to be distinguished from the modern view, bringing the testator into direct relation with the legatee, and reducing the ancient Heir to a mere official for distributing property.

The principle of the Roman Law until the introduction of inventories by Justinian was that the heir, as regards third parties, stood exactly in the shoes of the deceased, and was bound to pay all his debts, even if he obtained no property from him whatever. By the provisions of the XII Tables the testator, after his debts were paid, could bequeath the whole surplus of his estate to legatees. This freedom defeated itself. No inducement was left to the heir to accept the inheritance, who accordingly, by refusing to act, nullified the testament, and deprived the legatees of everything. After two ineffectual attempts to deal with this question by legislation, in the year B.C. 39, under Augustus, a statute was passed (*Lex Falcidia*) providing that in every case the heir should have one-fourth of the clear proceeds of the estate. In estimating the clear proceeds, all the debts were

Liability
of Heir.

deducted, and the funeral expenses and the price of slaves ordered to be manumitted by the will.

Inven-
tories.

Justinian introduced a profounder change in this than in any other branch of law. He broke up an association of ideas riveted by the practice of more than a thousand years. The ideas of 'heir' and of 'unlimited liability' were indissolubly associated for ages. Justinian, at one bold stroke, converted the heir into a mere official, appointed by the testator for the purpose of winding up his affairs and distributing his property. The heir now differed in nothing from a modern executor, except that he was continued in the heir's right to a fourth (*Falcidia Quarta*), unless the testator expressly forbade it, and he was entitled to the property left by the testator, in so far as it was not swallowed up in legacies. This result was accomplished by a process of gentle compulsion. If the heir did not make an inventory—setting forth all the property of the deceased—he continued liable not merely for the debts of the deceased, but, in addition, he was compelled to pay all the legacies, should the assets prove insufficient. On the other hand, if the heir made a full inventory, in compliance with the terms of the law, he was released from all personal liability for the debts of the deceased, and was not bound to pay beyond the assets that came into his hands.

The essence of a Roman will, as has been already stated, was the nomination of a universal successor to a deceased person ; if a will failed in that point, it was wholly and absolutely worthless ; if it accomplished that object, it could, but it need not, effect other purposes, such as the gift of legacies or the appointment of tutors. So fastidious was the Roman Law in keeping up this relation between the heir and the legatee, that until Justinian altered the law, a legacy occurring in the will before the appointment of the heir was void. In respect of its juridical essence and validity, a will was nothing but a lawful mode of nominating an heir. Even after the profound change introduced by Justinian, the essence of the *Testamentum* continued to be the valid and successful appointment of an heir. If none of the heirs named in the will could or would accept the inheritance, the will was void, and the legacies failed of effect. The further progress of the Roman Law was not accomplished by an extension of the *testamentum*, but by practically superseding it, through a new mode of declaring a last will by *codicilli* and *fideicommissa*, which will be explained hereafter.

Nature of
Roman
Will.

A *testamentum*, as we might infer from its history, was an extremely complex document. In order that it should operate effectually, it must comply with five sets of conditions. (1.) Certain forms

Essentials
of Roman
Will.

must be observed ; (2.) Certain persons must either be made heirs or be formally disinherited ; (3.) To certain persons a definite portion of the testator's property must be left ; (4.) An heir must be properly instituted ; and (5.) The testator, witnesses, and heir must be severally capable by law of taking the part assigned to them. Even when a will complied with all these conditions, it might ultimately fail, owing to circumstances arising beyond the testator's control. Nay, the will might remain perfectly good, and yet if the heir named for any reason refused to accept, the whole fell to the ground. A few words upon each of these points will suffice.

Forms
of Will.

The old will of Republican Rome was originally a conveyance *inter vivos*. The maker of the will summoned five witnesses, Roman citizens over puberty, and a balance-holder (*libripens*). He then conveyed his whole legal status to a nominal purchaser (*familiae emptor*). At first this person was the heir, upon whom after the death of the testator devolved the duty of paying the legacies. At this stage, the transaction differed in little from an ordinary conveyance. The next step was to employ a *familiae emptor* merely for form's sake, the name of the heir being contained in a written document which was not opened till the testator's death. Up to this point, the development of the

will was carried on by the jurisconsults. The next step was taken by the Praetor. He set forth in his edict that when a written will was sealed with the seals of seven witnesses (a number made up by adding the *libripens* and *familiae emptor* to the number of witnesses required for a *mancipatio*), he would give the person named as heir in the will the possession of the inheritance, even although no formal sale took place. By subsequent imperial legislation the signatures of the testator and witnesses were required. The written will, as it existed in the time of Justinian, had thus a threefold origin (*jus tripartitum*). The making of the will (*uno contextu*), and the presence of the witnesses all together at the ceremony, were a reminiscence of the will by *mancipatio*. The seals and number of the witnesses came from the Praetor's edict. The signatures of the testator and witnesses at the foot of the will form the contribution of imperial legislation.

The next condition of a valid will was that if certain persons were not named heirs they should be expressly disinherited. At first this applied only to such persons as were under the *potestas* of the deceased, and became independent (*sui juris*) by his death. These heirs were called *sui heredes*. In the time of Justinian the law stood thus. On pain of invalidating his will, a testator must

Disheri-
son.

Joint-
Family.

appoint heirs, or disinherit by name not merely *sui heredes* but all his descendants through males, whether born at the testator's death or then in the womb. Inasmuch as the testator was perfectly free to disinherit all his children, it might have been assumed that if he did not name them as heirs, he intended to exclude them from the inheritance. The true reason for this technical rule, so eminently calculated to be fatal to wills, was that the old theory of the family implied a species of copartnership in the family estate. The children became owners on the death of the *paterfamilias*, who, during his life, was the sole administrator, and the law regarded them as being owners unless something had been done to turn them out. The father had the power to do so, but unless he exercised that power, there was no vacancy, to which he could nominate strangers as heirs. This conception of a family copartnership must have had its roots deep in the Roman mind before it could have maintained so long an arbitrary rule, which even the all-devouring zeal of Justinian did not remove.

Legitim. When the testamentary power was conclusively sanctioned in the XII Tables, it was recognised as in its nature exceptional, and as an invasion of the rights of the family; but no hard and fast line was adopted to prevent the testator from leaving his children destitute. A

remedy, however, was introduced on the plea that the testator's will was contrary to his duty (*testamentum inofficiosum*), and that consequently he was not of sound mind when he drew up the will. The meaning was not that the father was really mad, but rather that his will ought to be treated as if he were mad. In considering this limitation of a testator's freedom, and the necessity of making some provision (*legitima portio*) for his nearest relatives, we must not forget that the children of the Roman *paterfamilias* had no rights of property, and that what they acquired in virtue of their own exertions or of the liberality of others was the property of their father. Thus to disable them, and at the same time to permit the father to give what was in morals although not in law their own property to strangers, would have been to sanction a species of injustice which it is not in the power of any father in modern times to commit. After some fluctuation, the doctrine of the Roman Law came to be that the testator should leave a fourth of the amount that would have fallen in case of intestacy to his children. Children were required in the same way to remember their parents in their wills, and even brothers and sisters were forbidden to exclude brothers and sisters in favour of strangers of doubtful reputation.

Institution
of Heir.

The next point requiring the attention of a testator was the formal nomination of an heir. In early times, stated language was employed, as *Lucius Titius mihi heres esto*, but at length it was sufficient if the testator's intention was shown.

The appointment must, however, be in express language ; it could not be inferred from the testator's throwing upon a person duties appropriate to an heir. In case the person first named might die

Substitu-
tion.

or decline to act, it was usual to add another to take in such an event. This was called substitution, and could be carried to any extent, usually ending with the name of a slave of the testator, who obtained his freedom, but could not refuse the inheritance. This substitution (*substitutio vulgaris*) took effect only if the person instituted heir declined ; if he once accepted, the substitution was at an end. In one case, however, the Roman Law permitted a substitute to come in even after a person instituted had accepted. A testator might say, ' Let Titius my son be my heir. If my son shall not be my heir, or if he shall become my heir, and die before he comes to puberty, then let Seius be my heir.' A son could make a will after puberty, but not before, so that in effect such a substitution (*substitutio pupillaris*) was an appointment of an heir to the son until he arrived at the age when he could name one for himself. Justinian extended

this indulgence to parents of insane children to name substitute heirs until their death or the recovery of their reason. This was called *substitutio exemplaris*.

The grounds of incapacity to make a will or to be a witness or heir are not of sufficient interest to require detailed statement. They are collected in 'Roman Law,' pp. 615-624. Incapacity.

If a will did not comply with the proper forms, or did not name an heir, or the testator, heir, or any of the witnesses were incapable of acting their several parts, or if the testator did not expressly disinherit his children, the will was said to be *injustum*, or *non jure factum*, or *nullius momenti*. If it was right in those points, but did not make provision for the legitim (*legitima portio*) of children, it was *inofficiosum*. If the will was originally good, but no one took as heir under the will, or the testator lost his capacity before his death, it was said to be *irritum* or *destitutum*. If the testator made a new will, or his will became invalidated by the subsequent birth of a person requiring to be disinherited, the original will was *ruptum*. Defects in Wills.

From this brief sketch, it may be understood how perilous was the act of testation, even in the latest times. We may well ask why a people with the practical genius of the Romans for law continued to submit to a form of will that must con- Non-formal Will.

stantly have frustrated the intentions of testators and the expectations of legatees. The explanation of this puzzle is found in the fact that, in the time of Augustus, a new mode of testation was introduced, which successfully enabled testators to avoid the snares and pitfalls of the *testamentum*. The mountain was too great to remove, but a way was found of simply walking round it. The device invented for this purpose was the non-formal will *Codicilli*. of the Roman Law—*codicilli*. In their origin and essence, *codicilli* present a complete contrast to the *testamentum*. They were in the nature of requests to persons who, independently of the *codicilli*, were heirs, to give to others either some specific articles, or a fraction or even the whole of the inheritance. By *codicilli* a legal heir could not be appointed. They were free from all formalities, although Theodosius (A.D. 424) required the presence of five witnesses ; but even if this testimony was wanting, a person claiming as legatee could compel the heir to tell upon oath what instructions he had received. By *codicilli* no person could be disinherited, nor did their validity depend upon providing legitim. If there was no *testamentum*, *codicilli* operated by way of trust on the heirs *ab intestato* ; but if there was a *testamentum*, they were considered a charge upon the testamentary heirs, and were made to stand or fall with the will. If *codicilli* were

made before a *testamentum*, the *codicilli* were presumed to be cancelled, unless the contrary was proved. It was usual, therefore, in a will to confirm *codicilli* previously made, if the testator wished them to be carried out.

We are informed by Justinian that the Romans ^{Trusts.} owed the introduction of *codicilli* to the Emperor Augustus. They became exceedingly popular on account of their convenience when the Romans were away from home, and soon a special judge was appointed to take charge of trusts (*fideicommissa*). These trusts were charges on the legal heir, whether he were appointed by will or succeeded to an intestate. From the first, great latitude was allowed in trusts. Thus aliens and Latins could take by way of trust, although not under a will. Women could take an inheritance by trust, free from the restrictions of the *lex Voconia*. Again, by means of trusts much greater flexibility was introduced in the settlement of property. A testator by way of trust could give his inheritance to A. for life, then to B. for life, and then to divide it between C., D., and E. Again, A. and B. might be heirs on trust that, if one died without children, his share should go to the survivor, and, if both died without children, the whole should go to C. Such limitations were impossible in a *testamentum*.

In one respect *fideicommissa* were slow in attain-

*Heres and
Fideicom-
missarius.*

ing maturity. When a testator—to take a simple case—charged his heir to give up one-half of the inheritance to another, it was no easy task rightly to adjust the relations of the two persons. The maxim of the Roman Law was,—once an heir, always an heir. An heir could part with the goods he received, but he could not divest himself of his liabilities. The first plan was to sell the portion of the inheritance subject to the trust to the person named for a nominal sum, and require him to guarantee the heir against a corresponding amount of the debts. In A.D. 62, in the time of Nero, the *Senatus Consultum Trebellianum* was made, providing that, in the case of inheritances wholly or partially given up under a trust, the actions heretofore given to or against the heir, should be given to and against those to whom under the will the property was required to be surrendered. This statute was perfect, except in one point. It did not compel the legal heir to enter *pro forma* and transfer the inheritance. In a mature law of trusts it is an elementary maxim, that a trust shall not fail from want of a trustee; but in this early stage of their growth, the maxim was that the trust must fail unless there was a trustee.

Pegasian
Fourth.

The next step was characteristic. By the *Senatus Consultum Pegasianum* (A.D. 70), a bribe

was offered to the heir to enter ; he was allowed to retain a clear fourth. This, by analogy to the Falcidian fourth, was known as the *Quarta Pegasiana*. If, then, a legal heir was left by the will a fourth, or upwards, he entered, and the *Senatus Consultum Trebellianum* divided the liabilities in proportion to the shares of the inheritance. But if less than a fourth was left by will, the heir claimed the benefit of the *Quarta Pegasiana*, and in this case the other statute did not apply, and at law the heir was saddled with the whole debts. Accordingly, in this case again, the old plan of a nominal sale of a portion of the inheritance was gone through, and mutual guarantees made by the heir and the beneficiary. Finally, Justinian put the law on a clear footing. He enacted that in every case the heir should enter, with the benefit of the *Senatus Consultum Trebellianum*, but that he should, nevertheless, have the benefit of the Pegasian fourth.

One step alone remained to complete the development of the law of testation. It became usual to insert in wills a clause to the effect that if for any reason the instrument failed as a will, it should be regarded as *codicilli*, and so bind the heirs *ab intestato*. This clause (*clausula codicillaris*) healed every defect in a will ; for the beneficiaries, if they could not sue under the will,

Codicillary
Clause.

could compel the heirs *ab intestato* to execute the provisions of the instrument as trusts.

SECT. II.—INTESTATE SUCCESSION.

Three
Periods. The law of intestate succession is most conveniently considered in three periods. The first takes the law as it stood at the time of the XII Tables; the third deals with the law as finally settled by Justinian, after the publication of the Institutes; and the second covers the space intervening. The first and the third periods are characterised by logical rigour and simplicity; the middle period is one of confusing transition. At the time of the XII Tables the inheritance descended to the family as based on the *potestas*. A father and an emancipated son were in law absolute strangers for the purpose of succession. By Justinian's latest enactments, the *potestas* is disregarded, and relationship is based on the tie of blood. In the language of the jurists agnation is superseded by cognation. In the interval between the XII Tables and the final legislation of Justinian, we trace the successive steps by which the natural came finally to supersede the artificial tie.

Order of
Succession.

SUCCESSION ACCORDING TO THE XII TABLES.

The classes that took an inheritance were as

follows :—(1) *sui heredes*; (2) in default of these, *agnati*; and (3) in default of these, *gentiles*.

Sui heredes were all those persons under the *potestas* or *manus* of the deceased who became independent on his death. Hence emancipated children, and daughters, if married and in the *manus* of their husbands, could not succeed to their father. On the other hand adopted children did succeed. *Sui heredes* took equal shares, the males not taking more than the females, nor the elder more than the younger. If some were children and others descendants of children, those descendants took only the share that their parent would have taken if alive.

Agnati formed a wider group, having the same centre, but a larger circumference. Persons are *agnati* when they are so related to a common ancestor that if they had been alive together with him, they would have been under his *potestas*. The constitution of a Roman family under the *potestas* has already been considered (pp. 27, 28). The agnates nearest in kinship excluded the more remote, and those in an equal degree of propinquity took equal shares. Failing *agnati*, the members of the *gens* to which the deceased belonged took the inheritance. Who these were, is a problem too difficult to consider here.—(See ‘Roman Law,’ pp. 656-659.)

SUCCESSION FROM THE XII TABLES TO JUSTINIAN.

Changes
by Prae-
tor.

It would be wearisome and uninformative to trace the changes from the XII Tables to Justinian in detail. But the broader features may be indicated. The Praetor introduced two great innovations. First, he allowed emancipated children to succeed along with *sui heredes*; and he allowed more distant blood relations (*cognati*) to come in after the *agnati*. Thus according to the Praetor the order of succession was—(1) children (*unde liberi*), whether under *potestas* or not; (2) statutory heirs (*unde legitimi*), consisting principally of *agnati*; and (3) *cognati*, or blood relations not included in the previous classes.

Statutory
Changes.

Again, by the *Senatus Consultum Tertullianum* (A.D. 158), freeborn women having three children, or freedwomen having four, were enabled to succeed to their children; and by the *Senatus Consultum Orphitianum* (A.D. 178), children were permitted to succeed to their mothers.

JUSTINIAN'S FINAL LEGISLATION. NOVELS 118 AND 127.

Order of
Succession.

Justinian regulated succession in three classes—(1) Descendants; (2) Ascendants, along with brothers and sisters; and (3) Collaterals.

First. Descendants excluded all others. Children take equal shares; grandchildren take the share their parent would have taken if alive.

Secondly. Failing descendants, ascendants came in along with brothers and sisters of the whole blood. Children of a deceased sister or brother took that person's share.

Thirdly. Failing those, the next of kin succeed, the nearer excluding the more remote, and those in the same degree taking equal shares.

VESTING OF AN INHERITANCE.—For the purpose of vesting, heirs are divisible in the Roman Law into three classes—(1) *Necessarii heredes*; (2) *Sui et necessarii heredes*; and (3) *Extranei heredes*.

A necessary heir is a slave of the deceased declared free and appointed heir by his master's will. He could not refuse the inheritance. Hence, as a last resort, a slave was named heir to prevent his master's inheritance, in case he died insolvent, from being sold in his master's name, and thereby bringing upon him posthumous ignominy.

The *sui et necessarii heredes* were those under the *potestas* of deceased. At first they could not, any more than slaves, decline the inheritance; and they succeeded without the necessity of any actual acceptance. The Praetor gave them the privilege of refusal (*beneficium abstinendi*) if they did not interfere with the inheritance.

Extranei heredes embraced all other persons.

Necessarius Heres.

Sui Heredes.

Other Heirs.

They did not become heirs until they accepted (*aditio hereditatis*), either expressly and formally, or by acts of interference with the property of deceased.

SECT. III.—LEGACY.

Basis of
Law of
Legacy.

The law of bequest was founded on a single principle, namely, the intention of the testator. The rights of the legatee, and all the incidents connected with the legacy, have no other origin than the will of the testator. The law of bequest is therefore simply the interpretation of legacies. But the will of a testator is limited by two circumstances, one permanent, the other local and temporary. Everywhere the will of a testator is circumscribed by the general laws of his country. The State defines what property can be bequeathed, who may be legatees, and subject to what restrictions testation will be allowed. But in Rome, beyond these general limits, narrower restraints were imposed by the spirit of legal Formalism that pervaded every branch of the law. It was the universal tendency of the old Roman Law to prefer the form to the spirit; and thus, in the law of legacy, the intention of the testator was not respected unless it was expressed in one or other of certain precise forms.

Old Forms
of Bequest.

During the Republic a legacy must be made in one

of four forms. The first was said to be *per vindicationem*, because it transferred the ownership of the thing bequeathed to the legatee immediately that the heir entered. It ran in this form:—‘To Lucius Titius I give and bequeath the slave Stichus.’ The second was *per damnationem*. It imposed a duty on the heir. ‘Let my heir be condemned to give Stichus, my slave, to Lucius Titius.’ These were the chief forms, the others were mere variations. The third, called *sinendi modo*, ran thus, ‘Let my heir be condemned to allow Lucius Titius to take and have for himself the slave Stichus.’ The fourth, *per praeceptionem*, was to this effect:—‘Let Lucius Titius pick out (*praecipito*) first the ‘slave Stichus,’ that is, before the division of the inheritance, Titius being here taken to be a co-heir.

The introduction of trusts (*fideicommissa*) in the time of Augustus afforded a means of escape from the narrow pedantry of the old forms of legacy. During the Empire, the two systems continued side by side. A testator might rely upon the old rules, or, if they did not suit his purpose, he could take advantage of trusts. Justinian fused the old law with the newer equity, and enacted that legacies should be construed with all the liberality of trusts, and that trusts should be enforced by all the remedies applicable to legacies. The law was

Trusts and
Legacies.

Fusion of
Law and
Equity.

thus placed on a simple and right foundation. It rested upon the intention of the testator, and it was carried out by direct and appropriate actions.

*Donatio
Mortis
Causa.*

A gift in anticipation of death (*donatio mortis causa*) was made subject to nearly all the rules of legacies. Such a gift was made to the donee, or to any one on his behalf, on condition that it should be his property if the donor died ; but that if the donor should survive the anticipated peril, he should have his property back. Such a gift required to be attested by five witnesses.

*Legacy of
Mortgaged
Property.*

The law of legacy is a law of detail, and cannot well be summarised. It will be sufficient in this place to advert to a few points. When the property bequeathed was mortgaged, the heir was bound to pay off the mortgage, unless he could prove either that the testator was not aware of the mortgage, or that the testator expressly charged

*Legacy of
Debts.*

the legatee to pay it off. Again, money due to a testator might be the object of a legacy, and if it were not paid in the testator's lifetime (in which case the legacy was extinguished), the heir was bound to permit the legatee to sue the debtor in his name. If the testator bequeathed to a debtor the amount due to him, the debtor could demand a formal release from the heir. A legacy of a sum due by the testator to his creditor was inept, unless it differed in some respect from the debt.

The chief distinction in legacies was between specific and general legacies. When a testator bequeathed a determinate, specific thing, then upon the entry of the heir the legatee became owner. If a quantity of anything was bequeathed, the legatee was simply a creditor of the heir for the amount. By a legacy of 20 *aurei*, the relation merely of debtor and creditor was established ; but a legacy of all the *aurei* in a chest made the legatee owner of the particular coins.

Error in names was harmless. So a false description did not annul a legacy (*falsa demonstratio non nocet*). When a part of the description is sufficient to identify the object or person, and the remainder of the description is unnecessary for that purpose, the falsehood of this superfluous addition is immaterial. But if the whole of the description is necessary and part of it is erroneous, the legacy fails. A testator had two slaves, Philonicus, a baker, and Flaccus, a fuller. He bequeathed to his wife Flaccus the baker. If the testator knew the names of the slaves, Flaccus will be the legacy ; if he knew them by their occupations and not by their names, Philonicus will be given. On the contrary, if A. bequeaths to B. the sum Titius owes to A., and Titius owes nothing, the legacy must fail, as there is nothing to determine the legacy except the amount due by Titius.

Specific
Legacies.

Mistake.

*Falsa
Demon-
stratio.*

*Falsa
Causa.*

Akin to this is the rule that a mistaken inducement (*falsa causa*) does not vitiate a legacy, as when one says, 'To Titius, because in my absence he looked after my business, I give and leave Stichus,' or, 'To Titius, because by his advocacy I was cleared of a capital charge, I give and leave Stichus.' For although Titius never managed any business for the testator, and although his advocacy never cleared him, yet the legacy takes effect. But if the heir could prove that the testator would not have left the legacy but for his erroneous belief, he could defeat the legatee on the ground that his claim was against good conscience (*exceptio doli mali*).

Restraints
on Alienation.

Among the restraints on testation only two call here for special notice. A testator could not bequeath property and forbid the legatee to alien it; but according to a rescript of Severus and Antoninus, although a general prohibition to alienate was void, yet if the restriction was made in the interest of a limited class, as children, freedmen, heirs, or any specified person, it was upheld, of course without prejudice to the creditors of the testator. In this way a very strict entail might be estab-

Restraints
on Marriage.

lished. A similar rule applied to conditions in restraint of marriage. If the legatee or heir were forbidden to marry anybody, the legacy or will was perfectly good, and the restriction was null

and void. But a condition that the heir or legatee should not marry a particular person or persons was good.

A legacy might be revoked by express language, or if the thing bequeathed perished. A revocation was implied from a serious quarrel arising between the testator and the legatee after the making of the legacy. A testator gave his freedman a legacy, and in a subsequent will described him as ungrateful. This was held to be an implied revocation. A subsequent mortgage of the thing bequeathed did not revoke the legacy; on the contrary, the presumption was that the testator intended the heir to pay off the mortgage. If the testator alienated the property, the presumption was that he meant to revoke the legacy, and it was for the legatee, if he could, to prove the contrary. If, however, the alienation was prompted by necessity, the burden of proving an intention to revoke lay on the heir.

Revoca-
tion of
Legacies.

CHAPTER VI.

THE LAW OF PROCEDURE.

Historical
Interest of
Roman
Procedure.

THE interest attaching to the Roman Law of Procedure is mainly historical. From the pages of Gaius, we can trace, in outline at least, the steps by which civil procedure was brought to a satisfactory condition. The history of Procedure is, in one word, the history of the efforts of the State to control the transactions of men. It is the history of the growth of jurisdiction. At first the right of the State to interfere in private quarrels is not recognised; but later on, the Roman magistrate appears in the guise of a voluntary arbitrator, a character that insensibly changed into a compulsory arbitrator. For the sake of clearness, it will be convenient to illustrate this proposition by examining the history of procedure under four heads. These shall be, in order, the successive steps in a lawsuit:—(1) the summons to court; (2) proceedings from the appearance of the parties in court till judgment; (3) execution of judgments; and (4) appeals.

Jurisdiction
springs
from Arbitration.

THE SUMMONS.—The process of summoning a defendant to court exhibits, in a marked manner, the early characteristics of civil jurisdiction. By the law of the XII Tables a complainant personally summoned a defendant. If the defendant refused, he could call witnesses to his refusal, and thereupon drag him before the court. The law did not impose a legal duty upon the defendant to obey, and if he did not go, no further proceedings could be taken; all that the XII Tables authorised was, on proof of a refusal, that the complainant might use force, without incurring any liability. The Praetor, however, carried the law a step further. He made it an offence to refuse obedience to a summons, or to rescue a person summoned, or in any way to aid his escape. Thus by the action of the Praetor, the Roman magistrate assumed a right to hear all disputes, and the first step in civil jurisdiction was established. Later on, under the Empire, the summons was served by a public officer, and it was made in writing (*libellus conventionis*), containing a precise statement of the demands of the complainant.

FROM APPEARANCE TILL JUDGMENT.—Until the reign of Diocletian (with a few exceptions not requiring notice in this place) a true civil court did not exist in Rome. To those who read warm

Reference
to Arbitra-
tion.

eulogies on the civil procedure of Republican Rome, this statement may appear a strange paradox. It admits, however, of a simple demonstration. Before the time of Diocletian, the ordinary civil trial in Rome consisted in a reference to arbitration. What happened was exactly the same as if in an English suit, at the close of the pleadings, a case, instead of being tried by a judge and jury, or by a judge alone, was immediately referred to one or more arbitrators selected by the parties themselves, these arbitrators being laymen, and not lawyers.

The arbitrator, if only one was chosen, was called *judex* or *arbiter*, the distinction between which Cicero in one passage seems to regard as an idle quibble. The *judex* or *arbiter* was not a lawyer; he was not paid; he was compelled to act, if duly selected; and he was called in for a single case only. For many centuries, only a senator could be selected as a *judex*, but towards the end of the Republic the class of *judices* was enlarged; and in the time of Pliny the register of *judices* numbered several thousands. The patrician institution of the *judices* was balanced by the *Centumviri*, who might be plebeians. These were elected, according to Festus, five from each of the 35 tribes, making in all 105. The centumviral tribunal was closely identified with the old institu-

tions of Rome, and asserted a special care of the *jus Quiritium*. Both *judices* and *centumviri* were for Roman citizens. When aliens were admitted to the protection of the civil law, the *judex* or *centumviri* could not be compelled to act; but the spirit of the Roman institution was observed, and the cause was referred to three or five persons (*recuperatores*) selected by the parties, either one or two by each party, with an umpire.

When an action is referred to arbitration, two stages are to be noticed. There is first the reference or selection of the arbitrator, and determination of the question to be referred to him; and secondly, the arbitration itself or the hearing. These two stages are distinguished in Roman Law by terms that have become classical in legal literature, *jus* ^{*jus.*} and *judicium*. ^{*judicium.*} The selection of the arbitrator and the settlement of the question to be decided took place under the authority of the Praetor (*in jure*); the hearing (*in judicio*) was before the *judex*, *arbiter*, *centumviri* or *recuperatores*. The procedure *in judicio* does not call for any remark in this connection; but the procedure *in jure* will repay some consideration.

The mode of reference was at first ORAL, afterwards *in writing*. The written reference was called a *formula*; the oral reference had no distinctive name, but it followed the form of one or other of

Oral
Reference.

Legis Actiones. the so-called *legis actiones*. The *legis actiones* could not be used by aliens (hence the introduction of *formulae* marks the admission of aliens to civil rights); and, like all the ancient formal proceedings of the Roman Law, could not be employed by an agent or representative of the parties. Every step in the *legis actio* must be taken by the parties themselves.

Sacramentum. The oldest of these forms of process (*sacramentum*) alone calls for notice. It was based on a mock combat, with a pretended voluntary reference to arbitration, and the wager of a sum that was to go to the arbitrator for his trouble. The moveable in dispute, say a slave was brought before the Praetor. The claimant held a rod (in the place of a spear), and grasping the slave, said, 'This slave I say is mine *ex jure Quiritium*, in accordance with the fitting ground therefor, as I have stated; and so upon thee I have laid this wand,' and at the same time laid the rod on the slave. The opposing party repeated the same words and the same acts. Then the Praetor said, 'Both let go the slave;' they let him go. The first claimant then said, 'I demand that you tell me on what ground you have claimed him;' and he answered, 'I fully told my right as I laid on the wand.' The first claimant retorted, 'Since you have claimed him wrongfully, I challenge you to

wager 500 *asses* (the *as* was a small coin); and the opposing party, 'In like manner I challenge thee.' After this ceremony the Praetor inquired into the merits of the case, and adjudicated the *interim* possession to one of the parties; the other party then appeared as plaintiff before the *judex*, to whom the question was referred in this singular form—not which of the parties was the owner, but which of them was right in his wager. In this short drama, which formed the prelude for many years to every Roman action, we cannot fail to perceive the true origin of civil jurisdiction—the submission of disputants to the award of an arbitrator to prevent the effusion of blood.

The system of *legis actiones* was superseded by *Formulae*. the use of *formulae*. When the Praetors first determined to administer justice in cases where one of the parties was alien, they dispensed with the ceremonies exclusively appertaining to the old customs of Rome, proceeded at once to inquire into the nature of the dispute, and put in writing the questions to be decided by the arbitrator. The great superiority of this method recommended it in quarrels between citizens, to whom the rigorous and narrow pedantry of the *legis actio* became odious. By the *lex Aebutia* (B.C. 164 or 170), and the *leges Juliae* (*temp.* Julius Cæsar or Augustus), the use of *formulae* was extended to actions be-

*Formula
in Factum
Concepta.*

tween citizens. The earliest *formulae* were so framed as to avoid the allegation of an *obligatio*. There would have been a difficulty in saying that an alien had a strict right. Accordingly, the *formula* contained merely allegations of fact, stated hypothetically, followed by an authority to the arbitrator to award damages if the facts were proved. Thus, in the case of deposit, the *formula in factum* ran:—‘*Let Lucius Titius be judex. If it appears that A. A. deposited with N. N. a silver table, and that, by the fraud of N. N., it has not been given back to A. A., whatever turns out to be the value of the article, that sum of money, judex, condemn N. N. to pay A. A. If it does not so appear, acquit him.*’ In the case of citizens, there was no reason to shrink from alleging a duty. Accordingly, the *formula in jus* was framed upon a positive allegation of fact, followed by an allegation of legal duty. The allegation of fact was called *demonstratio*; the allegation of legal duty was called *intentio*; and the power to award damages *condemnatio*. When, as in actions for division of property, an authority was given to assign different parts to the various claimants, the place of the *condemnatio* was taken by the *adjudicatio*. Such a *formula* ran thus:—‘*Let Lucius Titius be judex. Whereas A. A. sold a slave to N. N. If it appears that N. N. ought to give A. A. 10,000 sesterii, then judex,*

Demonstratio.

*Intentio.
Condemnatio.*

*Adjudicatio.
Formula
in jus
Concepta.*

condemn N. N. to pay 10,000 sesterii to A. A. If it does not so appear, acquit him. Sometimes another part, called the *exceptio* was introduced. In formal contracts or formal transactions generally, the Roman Law did not originally allow the defence of fraud; and although the plaintiff had induced the defendant to bind himself by the grossest fraud, that was not a question into which the *judex* could enter. But, at length, *Gallus Aquilius*, a colleague of Cicero, introduced such a defence, and, accordingly, after his time, the *formula* might embrace a proviso, 'If in that matter nothing has been done, or is being done, by fraud on the part of the plaintiff.' Many similar provisions were allowed. As the *exceptio* was based on equity, any countervailing facts could be brought forward in reply by the plaintiff. This answer to the *exceptio* was called *replicatio*.

It thus appears that, viewed as a system of pleading, the formulary system was rude and imperfect. It conveyed the slightest possible information to the defendant, and scarcely took more than the first step in eliminating the real issues between the parties. This—the true end of all pleading—was thus most inadequately accomplished during the golden era of Roman Jurisprudence.

Defects of
Formulae.

Interdicts. In the larger work on Roman Law (p. 836, *sq.*), the nature of interdicts as distinguished from actions is discussed at length; here it must suffice to say that the interdict was a form of process created by the Praetor, and resting upon his authority as a magistrate; that it was employed mainly to protect rights in the nature of property introduced in his edict; and that the proceedings were modelled on the ordinary forms of *actio*. In the time of Justinian no formal interdict was granted, and there was nothing to distinguish *interdictum* from *actio* as forms of civil process.

Diocle-
tian's
Changes.

The distinction so prominent in Roman Law between *jus* and *judicium* continued until A.D. 294, when Diocletian abolished *judicia*, and enacted that all causes should be heard by judicial officers. The *formula* was no longer used, and its place was occupied by a preliminary discussion to elicit the points in dispute. Hence came the characteristic of the later Roman procedure, that the process which we may not inaptly call pleading, took place before the court itself. Causes were now heard by trained lawyers, instead of private arbitrators, and at last it may be said, the Romans obtained a true civil court.

Execution
against the
Person.

EXECUTION OF JUDGMENTS.—The natural way of compelling payment of a judgment debt, as it

would seem to us, is to take a portion of the debtor's property, if he has any, and sell it to satisfy the judgment creditor. If the debtor has no goods, then we may think of his person and imprison him. This mode of thought shows how far we have advanced from the ideas of the men who built up the fabric of civil jurisdiction. That which we think of as first, was last, and what we regard as last, was first. Execution directly against the property of a judgment debtor was not introduced in Rome until the time of the Emperor Antoninus Pius. The ancient mode of compelling the payment of debts is described to us by Aulus Gellius. The XII Tables provided ^{Law of XII Tables.} that a debtor was to have thirty days after the judgment debt was proved in order to pay. After that the creditor might arrest him and take him before the Praetor; if the debtor did not find a substitute (*vindex*) to answer for the debt, he was removed by the creditor and put in chains. On three successive market days the creditor was required to bring the debtor before the Praetor and proclaim the amount of his debt. If at the end of sixty days the debt was not paid, the debtor was reduced to slavery. In these proceedings, it is worthy of remark, the initiative is taken, not by the State, but by the creditor. The law interfered only to take precautions in the

interest of the debtor, so that no man might unlawfully seize another on the pretext of a debt. These proceedings were essentially a private act of force legalised and subjected to legal restraints. Just as the summons, in its first shape, was purely a private act, in which the law simply made the exercise of force lawful, so in the execution of judgments, the law went no further than a refusal to shield a debtor from his creditor.

Appeals
during
Republic.

APPEALS.—During the Republic, no appeal, properly so called, in a civil cause, existed. But a partial substitute for appeals was found in the right enjoyed by each of the higher magistrates of putting a veto on the acts of any other magistrate. Such a veto was called *intercessio*. The effect of the veto was purely negative ; it stopped for the time the act forbidden, but it could substitute nothing in its place. The concentration of all magisterial power in the hands of the Emperor soon led to the subordination of the tribunals, and the establishment of a final court of appeal. The Emperor was the highest judge, and sometimes heard causes himself ; but the *consistorium* or *auditorium*, consisting of the higher officials attached to the Emperor, formed the usual tribunal of ultimate appeal.

Appeals
under
Empire.

A P P E N D I X.



APPENDIX.

CHAPTER I.

1. What place does Roman Law occupy in General Jurisprudence?
2. Distinguish *jus civile* from *jus gentium*, and explain how the latter came to be identified with the Law of Nature.
3. Explain *leges regiae*, *jus Papirianum*, *jus Flavianum*, and *jus Aelianum*.
4. By what agencies is the adaptation of law to the wants of a progressive community accomplished? Compare on this point the history of Roman and English Law.
5. Give an account of the *Jurisprudentes*. In what manner did their labours contribute to the growth of Roman Law? Explain what is meant by the 'law of citation.'
6. Give a brief history of the *Edictum perpetuum*.
7. Upon what principles, and with what leading results, did the Praetor modify and enlarge the *jus civile*?
8. Explain *lex*, *plebiscitum*, *populiscitum*, *senatus consultum*, *constitutio*, *decretum*, *epistola*, *rescriptum*.
9. Give a brief statement of the modes of legislation under the Republic.
10. What attempts at codification were made prior to the time of Justinian?
11. Give an account of the legal achievements in the reign of Justinian. What is Blume's discovery?
12. What is the relation of the Institutes of Justinian to the Institutes of Gaius?

CHAPTER II.

SECTION I.

13. What place does slavery occupy among the institutions of ancient society?

14. What powers could a master legally exercise over his slave? Is the answer the same for the Republic and the age of the Antonines?

15. In what sense, and to what extent, could a slave enjoy rights of property?

16. In what ways did a person become a slave?

17. Explain *postliminium* and *capitis deminutio*.

18. In what ways could formal manumission be made? Distinguish between the effects of formal and non-formal manumission.

19. Give an account of *Latini Juniani* and *Dedititii*.

20. What restraints on manumission existed in the time of Justinian?

21. What rights had a patron over his manumitted slave?

SECTION II.

22. What legal powers could a father exercise over his legitimate children?

23. To what extent could a son or daughter under *potestas* enjoy rights of property?

24. Explain the constitution of the Roman family as based on the *patria potestas*.

25. What was *legitimatio per subsequens matrimonium*? In what cases did it apply?

26. What is the true place of adoption in the history of law? What change did Justinian introduce?

27. What was the legal relation of a father to an emancipated son, and to a son who had never been in his *potestas*?

28. Explain the phrases *alieni juris* and *sui juris*.

SECTION III.

29. Compare the legal position of a slave, a child under *potestas*, and a wife *in manu*.

30. In what way did *manus* become obsolete?

31. What legal relation existed between a husband and a wife not *in manu*?
32. In what way, and under what restrictions, was divorce sanctioned in the Roman Law? What provisions were made for the custody of children of divorced parents?
33. Give an account of the *dos* and *donatio propter nuptias*. Compare the Roman rules with the ordinary provisions of an English marriage settlement.

SECTION IV.

34. Compare the office of *tutor* with the functions of an English trustee or guardian.
35. Explain the phrase *interponere auctoritatem*.
36. Explain the rule of the civil law—*in rem suam auctorem tutorem fieri non posse*.
37. To what extent could a person under puberty acquire legal rights or subject himself to legal duties?
38. By what modes could a tutor be appointed?
39. In what cases was security required from *tutores*?
40. Could a person above the age of puberty obtain relief from an improvident bargain? What was the advantage of giving a curator to a person above the age of puberty?
41. To what other persons could curators be appointed?

CHAPTER III.

SECTION I.

42. Is individual ownership the earliest historical form of property?
43. Specify the two leading defects of the ancient Roman law of property.
44. What were *res Mancipi*? Describe *mancipatio*.
45. Explain the origin and fate of the distinction between Quiritarian and Bonitarian ownership.
46. By whom, and in what way, was the enjoyment of property in Rome secured to aliens?
47. *Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*. Explain this rule. To what

causes do you attribute its appearance in Roman Law? Illustrate your answer by reference to the rule of English Law.

48. In what various ways could *traditio* be effected?

49. What conditions were necessary to acquire the ownership of a thing by prescription?

50. Distinguish between Positive and Negative Prescription? What was the practical importance of the distinction?

51. What things were *res nullius*, and how could the ownership of them be acquired?

52. What were the several kinds of accession? What is the logical basis of accession, and by what equitable principles was its application accompanied?

53. Upon what principle was the ownership settled of an island formed in a river (1) by accretion in mid-stream, and (2) by a change in the course of the river?

54. Did the Roman Law recognise the right of a tenant farmer to compensation for unexhausted improvements?

55. What was the Roman rule in regard to tenants' fixtures?

56. Did the doctrine of principal and accessory apply in the case of books and pictures?

57. Give an account of *specificatio*, and distinguish from *commixtio* and *confusio*.

58. Explain *res extra nostrum patrimonium* and *res divini juris*.

59. Distinguish and compare *res communes*, *res publicae*, and *res universitatis*.

60. What rights did the public enjoy under the Roman Law in (1) the sea; (2) the sea-shore; (3) rivers; and (4) the banks of rivers?

SECTION II.

61. Is an estate for life properly described as limited ownership or as a personal servitude?

62. State and criticise the distinction made by the Roman jurists between personal and praedial servitudes.

63. Compare and criticise the distinction made between corporeal and incorporeal things in the English and in the Roman Law respectively.

64. Distinguish usufruct from quasi-usufruct.
65. Compare the rights of a usufructuary of land with the powers of an English tenant for life.
66. What restrictions were imposed on the usufructuary of a house?
67. How was usufruct created and extinguished?
68. Explain *usus*, *habitatio*, *operae servorum*, and *precarium*.

SECTION III.

69. Define 'praedial servitude,' and explain *praedium dominans* and *praedium serviens*.
70. Explain the maxim—*nulli res sua servit*.
71. Distinguish between negative and affirmative servitudes.
72. What is meant by saying that servitudes must be 'perpetual,' that they are 'indivisible,' and that there cannot be a servitude of a servitude?
73. Distinguish urban and rural servitudes. Give the principal examples of each.
74. How were servitudes created and extinguished?

SECTION IV.

75. What is *emphyteusis*? What controversy as to its juridical place existed, and how was it removed?
76. Give an account of the rights of an *emphyteuta*, and of his superior landlord.

SECTION V.

77. What was the earliest form of mortgage in the Roman Law, and what were its defects?
78. Distinguish between *pignus* and *hypotheca*. How were they introduced, and in what way did they improve the Roman law of mortgage?
79. How was the 'power of sale' exercised by the mortgagee?
80. Did the Roman Law recognise 'foreclosure'?

81. By what rules was the right of priority determined when the same thing was mortgaged to more than one person?

82. In what cases was a mortgage implied without special agreement?

CHAPTER IV.

SECTION I.

83. Explain the distinction between rights *in rem* and rights *in personam*.

84. To which class of rights does 'contract' belong?

85. What causes led the Roman jurists to take the standpoint of '*obligatio*' instead of its equivalent, 'right *in personam*'?

86. Distinguish 'express contract,' 'implied contract,' and 'quasi-contract.'

87. Is it correct to class delicts with contracts as the two leading groups of '*obligationes*'?

88. Analyse an 'agreement.'

89. Explain *obligatio*, *conventio*, *contractus*, *pactum*, *pollicitatio*, *civilis obligatio*, *honoraria obligatio*, *naturalis obligatio*.

90. What is meant by essential error, and what are its kinds?

91. What is error *in materia* or *substantia*? State in what cases, according to Savigny, such error vitiated contracts?

92. When can an action be brought for breach of contract, (1) when no time, and (2) when a time has been agreed upon for performance?

93. Could a debtor be sued for breach of contract in a place different from that in which he had agreed to perform his promise?

94. If no place were designated in the contract for performance, where ought an action for breach of contract to be brought?

95. Define 'condition.' Could the condition relate to a past or present event?

96. Distinguish between *dies cedit* and *dies venit*. Apply

the distinction to (1) a conditional contract ; (2) an unconditional contract to be performed at a future day ; and (3) an unconditional contract to be performed at once.

97. What different rules as to conditions were applied in the law of contract and in the law of wills ?

98. Define *vis*, *metus*, and *dolus*. In what cases was a contract invalidated if it was made by one of the parties through *vis*, *metus*, or *dolus* ?

99. Give illustrations from the Roman Law of sale of the effects of *suppressio veri* and *suggestio falsi*.

100. If a written security is given against an intended loan, but the money is never lent, can an action be maintained on the security ?

101. Explain the maxim—*Impossibile nulla obligatio est*.

102. What was the *pactum de quota litis* ?

103. Show to what extent slaves and *filiifamilias* could bind themselves or their *peculium* by contract.

104. Explain the tardy recognition of agency in the Roman Law.

105. What is necessary to constitute true agency ?

106. How far under the later law could slaves, and *filiifamilias* act as agents ?

107. To what extent was a ship captain an agent for the owner ?

108. To what extent was a shopkeeper (*institor*) an agent for his employer ?

109. To what extent, according to Savigny, could one free person be agent for another in the later law ?

SECTION II.

110. Arrange the contracts of the Roman Law as set forth in the Institutes of Justinian.

111. What are the principles upon which the Roman contracts may be arranged ? Compare with the English law.

112. Explain and exemplify *pacta prætoria* and *pacta legitima*.

113. Explain the maxim—*Nuda pactio obligationem non parit, sed parit exceptionem*.

114. Enumerate the characteristics of *naturalis obligatio*.

SECTION III.

115. What is '*nexum*'?

116. What constituted a '*stipulatio*,' and what were the advantages of recording a stipulation in writing?

117. Explain *cautio*, *expensilatio*, *nomen transcriptitium*, *chirographum*, *sygrapha*.

SECTION IV.

118. What is *mutuum*? To what things did it apply?

119. Explain *pecunia trajectitia*.

120. State the purport of the *Senatus consultum Macedonianum*.

121. Define *commodatum*. Under what circumstances was the borrower bound to make good the loss of the thing borrowed?

122. What were the rights of a *commodatarius*?

123. What is *depositum*? When was a deposit said to be *miserabile*? What was the liability of the depositee for misconduct or negligence?

124. Define mandate. Could there be a mandate for the benefit of the *mandatarius* solely? Discuss the question.

125. Enumerate and exemplify the principal cases of mandate.

126. When can a *mandatarius* renounce?

127. Illustrate the proposition that a *mandatarius* must conform to his instructions.

128. What degree of care was incumbent on the *mandatarius*? Is the mandate an exception to any general rule?

129. What was the relation between a *mandator* and the third parties with whom the *mandatarius* made contracts on his behalf?

130. What rights had a *mandatarius* against a *mandator*?

131. If a *mandatarius* executed a mandate after the death of the *mandator*, but in ignorance of the fact, was he entitled to the usual rights of a *mandatarius*?

SECTION V.

132. Define Sale. How was a verbal contract of sale

affected—(1.) By an understanding that it should be committed to writing ; and (2.) By giving earnest ?

133. Could a contract of sale be set aside on the ground of inadequacy or excess in the price ?

134. At what moment was there a contract of sale when the determination of the price was left to a third party ?

135. Explain *vacua possessio*. Why did not the Roman Law require vendors to give the *ownership* of the thing sold ?

136. State in the language of jurisprudence the nature of the right acquired by a buyer in the thing sold in virtue of the contract of sale.

137. At what moment did the interest of a buyer in the thing sold commence ?

138. In what cases did goods sold remain at the risk of the vendor ?

139. State the effect, if buyer or seller were *in mora*.

140. Enumerate the duties of vendor and buyer respectively.

141. Explain the maxim '*caveat emptor*,' and account for the difference between the Roman and English Law.

SECTION VI.

142. Define *Locatio-conductio*. Distinguish it from *commodatum*, mandate, sale, and the similar innominate contract. Give examples.

143. What was the nature of the right that a tenant of land or houses had in the Roman Law ?

144. What were the duties of a landlord ?

145. Specify the duties of a tenant.

146. Explain the confusion between *locatio operarum* and *locatio operis*.

147. What were the duties of a workman ?

148. State the provisions of the *lex Rhodia de jactu*.

SECTION VII.

149. Define partnership. What is *leonina societas* ?

150. State the broad distinction between the Roman Law of partnership and modern law.

151. By what rules were the shares of partners determined?
152. In what way was partnership ended?
153. Enumerate and distinguish the several kinds of partnership.
154. What were the rights and duties of partners?

SECTION VIII.

155. Enumerate the ways whereby an obligation could be extinguished.
156. In what cases was impossibility an excuse for non-performance of an obligation?
157. Explain and illustrate the statement—*Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est.*
158. What was the Aquilian Stipulation?
159. Distinguish between the effects of a formal release and a *pactum de non petendo*.
160. When were actions extinguished by lapse of time?
161. Specify and distinguish the three cases to which the name of *novatio* was applied.
162. Was a right *in personam* transferable, and, if so, subject to what conditions?
163. What is *delegatio*? How was it effected? What was the legal presumption established by Justinian in regard to novation?

SECTION IX.

164. In what different ways could suretyship be created? Distinguish them, and arrange them according to their relative antiquity.
165. State the effect of the *Senatus consultum Velleianum*.
166. Could the surety be sued before the principal debtor?
167. In what cases did the discharge of the principal debtor release the surety, and in what cases did the discharge of the surety release the principal debtor? (See p. 128.)
168. Had a surety who paid the debt any right of contri-

bution against his co-sureties? State the provisions of the Roman Law on the subject.

SECTION X.

169. In what cases could money paid by mistake be recovered?

170. Examine the maxim, that ignorance of fact is an excuse, but not ignorance of law.

171. Compare *negotiorum gestio* with mandate.

SECTION XI.

172. Distinguish *injuria* from *damnum injuria*. Apply your distinction to the case of a slave.

173. Give instances of *injuria*.

174. To what extent was the plea of self-defence available?

175. When was an *injuria* said to be *atrox*?

176. Who had the right of action for an *injuria* done to a person under *potestas* or to a wife?

177. Classify wrongs to property.

178. Define theft. What is meant by stealing the use or possession of a thing?

179. By what principle was it settled when a non-owner could bring an action for theft? Apply the principle to *locatio-conductio*, *commodatum*, and deposit.

180. What penalties (civil or criminal) were provided by the Roman Law for theft?

181. What was the penalty for robbery?

182. What was the penalty imposed when a person forcibly seized a thing under a *bona fide* claim of right?

183. What were the provisions of the *lex Aquilia*?

184. In what cases was a *directa actio* available under the *lex Aquilia*, and in what cases a *utilis actio* and *actio in factum*?

185. Mention the illustrations of negligence given in the Institutes. What is meant by saying that want of skill is equivalent to negligence?

186. Did the Roman Law take account of consequential damages?

187. What remedies were provided for trespass and ejection?

188. What is meant by quasi-delict?

189. What liability was incurred by a *judex* giving a wrong decision?

190. What was the penalty for placing or hanging things so as to be a danger in thoroughfares?

191. State the liability of the occupier of a house for damage done by throwing things into thoroughfares.

192. What vicarious responsibility was incurred by ship-masters, innkeepers, and livery-stable keepers?

CHAPTER V.

SECTION I.

193. What contrast does Sir H. S. Maine draw between a will and the instrument from which it is historically derived?

194. How is heirship determined in Hindoo law?

195. Explain 'universal succession,' and '*damnosa hereditas*'?

196. What was the ancient character of intestate succession?

197. Explain the position of adoption as a link between intestate succession and wills.

198. What relation existed between the heir and the legatee?

199. State the object and provisions of the *lex Falcidia*.

200. In what way did Justinian enable heirs to escape unlimited liability?

201. What constituted the essence of a Roman will?

202. Enumerate the conditions necessary to a valid *testamentum*.

203. Describe the form of will in the time of Justinian, and explain the origin of its characteristic features.

204. What was *disherison*? How did the rules on the subject originate?

205. Explain *legitima portio*. Who were entitled to it?

206. Explain *institutio heredis*, *substitutio vulgaris*, *substitutio pupillaris*, and *substitutio exemplaris*.

207. When was a *testamentum* said to be *injustum, nullius momenti, inofficiosum, irritum, ruptum* or *destitutum*?

208. Explain how the drawbacks of the testament were got rid of by the use of *codicilli*.

209. How did *codicilli* take effect (1) if there was, and (2) if there was not, a testament?

210. Show how the power of testators was enlarged by trusts (*fideicommissa*).

211. Explain the necessity for, and the provisions of, the *Senatus consulta Trebellianum* and *Pegasianum*.

212. What was the nature and use of the *clausula codicillaris*?

SECTION II.

213. Into what periods may the history of intestate succession in Rome be divided?

214. Give the rules of succession as fixed by the XII Tables.

215. What were the principal changes introduced by the Praetor in intestate succession?

216. State the effects of the *Senatus consulta Tertulianum* and *Orphitianum*.

217. Describe the order of succession as fixed in Justinian's novels.

218. Distinguish *heredes necessarii*, *heredes sui et necessarii*, and *heredes extranei*, *beneficium abstinendi*, *aditio hereditatis*.

SECTION III.

219. What is the basis of the law of legacy?

220. Explain the forms of bequest *per vindicationem*, *per damnationem*, *sinendi modo*, and *per praeceptionem*.

221. Give an account of Justinian's fusion of legacies and trusts.

222. What is a *donatio mortis causa*?

223. When property bequeathed was subject to a mortgage, was the heir bound to pay off the mortgage?

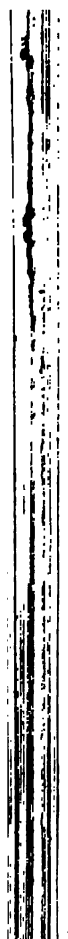
224. Could a debt be the object of a legacy?

225. What was the nature of the legatee's right when the legacy was (1) specific, and (2) general?
226. Explain and illustrate the maxims *falsa demonstratio non nocet*, and *falsa causa non nocet*.
227. Could a legacy be left with a restraint on alienation?
228. What restraints on marriage were illegal?
229. If a testator, after making his will, sold or mortgaged a thing left to a legatee, was the legacy thereby revoked?

CHAPTER VI.

230. Discuss the proposition that jurisdiction springs from arbitration.
231. Give a brief sketch of the history of the Roman Summons.
232. Explain the functions of the *judex*, *arbiter*, *centumviri*, and *recuperatores*.
233. Explain the distinction between *jus* and *judicium*.
234. What were the *legis actiones*? What were their disadvantages?
235. Give an account of the *sacramentum*.
236. How was the formulary system introduced?
237. Distinguish *formula in factum concepta*, and *formula in jus concepta*, and give an example of each.
238. Explain *demonstratio*, *intentio*, *condemnatio*, *adjudicatio*, *exceptio*, *replicatio*.
239. What defects characterised the formulary system?
240. What were *Interdicta*?
241. Explain the nature of the change introduced by Diocletian.
242. Give a historical sketch of the law of execution of judgments.
243. Who first authorised execution against a debtor's property?
244. Was appeal allowed in civil cases (1) under the Republic, and (2) under the Empire?

I N D E X.



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